2481

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 215.

E. BEMENT & SONS, PLAINTIFFS IN ERROR,

vs.

THE NATIONAL HARROW COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 19, 1900.

(18,003.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1901.

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a STATE OF NEW YORK:

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

Case and Exceptions.

Risley, Robinson & Love, attorneys for plaintiff, Utica, N. Y.
Cookinham, Sherman and Martin, attorneys for defendant, Utica, N. Y.
Filed Jan'y 29, 1898.

b Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 19th day of June, in the year of our Lord one thousand nine hundred, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge, presiding. W. H. Shankland, clerk.
Remittitur June 20th, 1900.

THE NATIONAL HARROW COMPANY, Appellant,
ag'st
E. BEMENT AND SONS, Respondent.

Be it remembered, that on the 29th day of January in the year of our Lord one thousand eight hundred and ninety-eight, The National Harrow Company the appellant in this action, came here into the court of appeals by Risley and Love its attorneys, and filed in the said court a notice of appeal and return thereto from the judgment and order of the appellate division of the supreme court in and for the fourth judicial department.

And E. Bement & Sons the respondent in said action after-
c wards appeared in said court of appeals by Cookinham, Sherman and Martin, their attorneys.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. Edwin H. Risley of counsel for the appellant, and by Mr. Henry J. Cookinham of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and judgment of special term affirmed with costs.

And it is also further ordered, that the record aforesaid, and the

proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed and judgment of special term affirmed with costs as aforesaid.

d And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *June 20th*, 1900.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] W. H. SHANKLAND, *Clerk.*

1 *Statement.*

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

Case and exceptions.

This action was commenced by service of a summons, complaint, temporary injunction and the affidavits on which the temporary injunction was granted, upon the agent of defendant in New York State, on or about the 10th day of October, 1894.

Defendant appeared and answered, and the action was then referred to William A. Matteson, Esq., of Utica, N. Y., and was tried before him and was decided in favor of the plaintiff on the 5th day of June, 1895. A judgment upon his report was entered in the Oneida county clerk's office on the 11th day of June, 1895, for $20,985 damages, and $1,525.23 costs amounting to $22,520.23, and for an accounting; an order modifying the judgment by striking out the provision as to an accounting was entered July 8, 1895.

Cookinham, Sherman & Martin have been substituted as attorneys for the defendant in place of Cookinham & Sherman. There has been no other change of parties or attorneys.

2

Supreme Court.

Trial desired in Oneida county.

NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, Utica, N. Y., September 21, 1894.

RISLEY, ROBINSON & LOVE,
Plaintiff's Attorneys.

Office address and post-office address, Herald building, Utica, New York.

Supreme Court, Oneida County.

NATIONAL HARROW COMPANY
vs.
E. BEMENT & SONS.

The plaintiff for a cause of action against the defendants, allege the following facts constituting its cause of action:

First. That the plaintiff is a corporation organized under the laws of the State of New Jersey having an office and place of business at the city of Utica, county of Oneida and State of New York.

3 Second. That the defendant is a corporation duly organized and doing business at the city of Lansing, Mich.

Third. That the National Harrow Company, hereinafter referred to, was a corporation duly organized under the laws of the State of New York, having its office and place of business at Utica, N. Y.

Fourth. That on or about the 1st day of April, 1891, the National Harrow Company of the State of New York at the city of Utica, N. Y., entered into license contracts with the defendants, copies of which contracts are hereto annexed and marked Exhibits "A" and "B" and are made a part of this complaint.

That both corporations entered upon the performance of the stipulations and agreements contained in said license contracts Exhibits "A" and "B".

Fifth. That the National Harrow Company of the State of New York, on or about the 9th day of September, 1891, duly sold, assigned, transferred and delivered to The National Harrow Company of New Jersey, this plaintiff, all of its right, title and interest in and to the license contracts (Exhibit- "A" and "B") and to all rights of action, privileges and benefits secured under and by virtue of said

license contracts aforesaid; and, thereupon, this plaintiff became, and was and now is, the owner and holder of all the rights, privileges and benefits arising or growing out of the license contracts, Exhibit "A" and "B".

Sixth. That this defendant and this plaintiff performed the stipulations contained in said license contracts and lived up to their requirements, except in the particulars hereinafter mentioned, until the 1st day of August, 1893.

Seventh. That this plaintiff has performed all of the stipulations, conditions and agreements to be done and performed on its
4 part, as assignee of said licenses, and is now ready and willing and desires to perform hereafter all of the stipulations and requirements specified and set forth in said license contracts to be performed on the part of the National Harrow Company.

Eighth. That since August, 1893, the defendant has failed, neglected and refused to perform the stipulations and conditions to be performed on its part, and has violated and is violating and intends to violate the stipulations and conditions agreed to be done and performed on its part in the following particulars, viz:

(*a*.) The defendant has failed, neglected and refused, although repeatedly requested so to do, to perform the stipulations contained in the second clause of the license contracts, by refusing to sign and verify reports and to mail the same to the National Harrow Company, of the sales of harrows, harrow frames and attachments applicable thereto, between the first and tenth days of each month since the first day of August, 1893, since which time it has made no reports, although it has sold and delivered a large number of harrows, harrow frames and attachments applicable thereto. That while the defendant has kept books in which it has entered sales of harrows, harrow frames and attachments applicable thereto, it has refused and still refuses, upon request being made, to allow this plaintiff, or its duly authorized agent, to inspect, during business hours, said books, and has refused and still refuses to allow extracts or statements to be taken from their said books for the information of the plaintiff. And it has, in violation of the terms of said license contracts, sold and delivered harrows, harrow frames and attachments applicable thereto, and delivered the same to the parties purchasing the same, to wit, to J. H. Wilhelm, Myerstown, Pa., to be sold on commission; and has, in violation of the terms of said license, allowed rebates or discounts from the prices fixed in the license contracts, in violation of the terms thereof, to wit,
5 they have allowed rebates and discounts not authorized by the terms of said license, to J. H. Wilhelm, of Myerstown, Pa., and to Coleman & Horton, of Nichols, Tioga county, N. Y., and to a large number of other persons, firms and corporations whose names are not now known to this plaintiff, and for that reason cannot be stated with more definiteness. That the rate of discount allowed to said parties and to all other parties to whom the defendants have sold, and rebate is from $1.50 to $2.00 in addition to the 10 per cent. discount authorized by the terms of the licenses; all of which has been done in violation of the terms of said license contracts and in

defiance of the rights and benefits secured to this plaintiff under said licenses;

(*b.*) That although this plaintiff has prepared and kept on hand, license labels provided to be placed upon the harrows under the fifth clause of the license contracts, the defendant has failed, neglected and refused, and still fails, neglects and refuses to attach and apply said license labels to the harrows sold by the defendant since August 1, 1893.

(*c.*) That the defendant has, contrary to and in violation of the sixth clause of said contracts, manufactured and sold, and has now on hand for sale, and intends to sell, other and different harrows, harrow frames and attachments applicable thereto, and other and different constructions from those licensed by the terms of said license contracts; and that they have manufactured and sold a large number of lever harrows employing curved teeth, known and designated by them in the trade, as the "Ajax" harrow. That said harrows have not been manufactured or sold or furnished to the other licensees of this plaintiff.

(*d.*) That by reason of the breaches of the conditions of the license contracts, hereinbefore referred to, the defendants are liable
6 to account to this plaintiff for all harrows sold and delivered in violation of the terms of said license contracts, to pay on all such harrows the sum of five dollars as fixed and liquidated damages therefor, and on account thereof, as provided to be paid in the seventh clause of said license contracts.

(*e.*) That the defendants have, in violation of the eighth clause of said license contracts, altered and changed the construction of the harrow, harrow frames and attachments applicable thereto, whereby the harrow has been made to differ in its manufacture and structure, from the one licensed to be sold in accordance with the terms of said license contracts; and that they are now selling, offering for sale, and have now on hand for sale, such altered and different harrows from those covered by the terms of said license contract.

(*f.*) That the defendant, in violation of the tenth clause of said license contracts, has authorized, permitted, and is now authorizing and permitting, and has procured to be manufactured, other and different styles of harrows than duplicates of the sample harrows which the defendant deposited with, and which is now in the possession of the secretary of this plaintiff, as the sample harrows, duplicates, of which the defendants are authorized to manufacture and sell, and they have now on hand a quantity of said altered and different harrows for sale and will sell the same in violation of the terms of the tenth clause of said license contract.

(*g.*) That by the eleventh clause of said license contracts, this plaintiff by agreement was authorized and is now authorized to restrain the breaches of the conditions of the said license contracts, as hereinbefore specified, by an injunction restraining further breaches thereof.

Ninth. That this plaintiff has a large number of other licensees whose business is interfered with, and interrupted by the wrongful conduct of the defendants in the particulars hereinbefore
7 stated, and that this plaintiff will be put to great damage

and expense, and a multiplicity of suits to restrain the wrongs and grievances growing out of the conduct on the part of the defendants, and it will suffer irreparable damages and injury which is not capable of being compensated in damages by the continued repetition of the wrongs and injuries committed by the defendants in violation of the terms and condition- of the license contract.

Tenth. That before the commencement of this action, the plaintiff and the defendant corporation filed with the secretary of state of the State of New York a sworn copy of their respective charters or certificates of incorporation and a statement under their respective corporate seals setting forth the business or object of the corporation which they were respectively engaged in carrying on within the State, and the place within the State which is to be its place of business, and each designating a person upon whom process against the corporation might be served within the State; and the persons so designated respectively have each a place of business within the State of New York wherein the respective corporations perform their corporate functions and acts and conduct their business. That the contract set forth in the complaint was made, executed and delivered and was by its terms to be performed within the State of New York, and breaches of said contract have occurred within the State of New York.

Wherefore, the plaintiff demands judgment:

1st. That a temporary injunction be granted restraining the defendants, their agents, attorneys, servants and employés from doing or suffering to be done, any act or thing in contravention of the terms of the license contract attached to and made a part of this complaint.

2d. That the defendants be decreed by the judgment of this court to perform all of the terms and conditions of the license con-
8 tract to be done and performed on the part of the defendants according to its true intent and meaning; and that the defendants be perpetually enjoined and restrained from violating or suffering to be violated any of the terms and conditions of the license contract during its continuance.

3d. That the plaintiff have such other and further relief in the premises as may be just and equitable; and that the defendants be decreed to account to the plaintiff for all harrows sold, in accordance with the terms of the license contract, and for all harrows sold by the defendants in violation of the terms and conditions of said license; and that the defendants be decreed to pay to the plaintiff all damages sustained by the plaintiff by reason of the violation of the terms and conditions of said license contract; and that the plaintiff have such other and further relief as to the court may seem just and equitable; and that the defendants be decreed to pay the costs of this action.

THE NATIONAL HARROW COMPANY,
[L. S.] By ORLANDO J. CHILDS, *Pres't.*

RISLEY, ROBINSON & LOVE,
Plaintiff's Attorneys.

Office and post-office address, Herald bldg., Utica, N. Y.

STATE OF NEW YORK, } ss:
County of Oneida, }

Orlando J. Childs, being duly sworn, says that he is the president of the plaintiff, and signed the corporate name to the foregoing bill of complaint and caused the corporate seal to be affixed thereto; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

ORLANDO J. CHILDS.

9 Subscribed and sworn to before me this 3d day of July, 1894.

H. C. SHOLES,
Notary Public, Oneida County, N. Y. [L. S.]

EXHIBIT "A."

License Contract.

Whereas, certain letters patent of the United States of America were issued to sundry parties and are now owned by the National Harrow Company a corporation organized and doing business at the city of Utica, in the county of Oneida, and State of New York, for new and useful improvements relating to float spring tooth harrows, float spring tooth harrow frames, and attachments applicable thereto, and are numbered and dated as follows to wit:

150,976, May 19, 1874.
197,703, Nov. 27, 1877.
205,449, June 25, 1878.
224,274, Feb. 10, 1880.
227,683, May 18, 1880.
233,718, Oct. 26, 1880.
239,947, April 12, 1881.
244,100, July 12, 1881.
245,718, Aug. 16, 1881.
251,208, Dec. 20, 1881.
264,360, Sept. 12, 1882.
271,938, Feb. 6, 1883.
284,278, Sept. 4, 1883.
309,416, Dec. 16, 1884.
327,340, Sept. 29, 1885.
348,544, Sept. 7, 1886.
359,539, March 15, 1887.
359,970, March 22, 1887.
361,792, April 26, 1887.
10 367,462, Aug. 2, 1887.
371,902, Oct. 18, 1887.
374,159, Nov. 29, 1887.
375,511, Dec. 27, 1887.
197,515, Nov. 27, 1877.
201,946, April 2, 1878.
224,273, Feb. 10, 1880.
224,275, Feb. 10, 1880.
232,192, Sept. 14, 1880.
235,071, Dec. 7, 1880.
241,528, May 17, 1881.
245,033, Aug. 2, 1881.
250,065, Nov. 29, 1881.
362,918, Aug. 22, 1882.
272,939, Feb. 27, 1883.
266,348, Oct. 24, 1882.
278,287, May 22, 1883.
301,675, July 1, 1884.
309,800, Dec. 23, 1884.
337,951, March 16, 1886.
358,839, March 8, 1887.
359,969, March 22, 1887.
360,985, April 12, 1887.
362,626, May 10, 1887.
370,915, Oct. 4, 1887.
371,903, Oct. 18, 1887.
375,510, Dec. 27, 1887.

378,081, Feb. 21, 1888.
382,304, May 8, 1888.
386,094, July 10, 1888.
390,065, Sept. 25, 1888.
392,312, Nov. 6, 1888.
393,156, Nov. 20, 1888.
396,696, Jan. 22, 1889.
399,731, March 19, 1889.
400,397, March 26, 1889.
401,833, April 23, 1889.
402,629, May 7, 1889.
405,459, June 18, 1889.
413,352, Oct. 22, 1889.
413,499, Oct. 22, 1889.
416,995, Dec. 10, 1889.
419,990, Jan. 21, 1890.
426,666, April 29, 1890.
428,310, May 20, 1890.
434,110, Aug. 12, 1890.
446,820, Feb. 17, 1891.

R. 10893, Jan. 10, 1888.
379,018, March 6, 1888.
386,021, July 10, 1888.
388,306, Aug. 21, 1888.
392,311, Nov. 6, 1888.
393,108, Nov. 20, 1888.
393,344, Nov. 20, 1888.
396,944, Jan. 29, 1889.
400,398, March 26, 1889.
402,079, April 23, 1889.
403,976, May 28, 1889.
405,580, June 18, 1889.
412,428, Oct. 8, 1889.
413,498, Oct. 22, 1889.
413,538, Oct. 22, 1889.
419,971, Jan. 21, 1890.
421,789, Feb. 18, 1890.
426,695, April 29, 1890.
428,329, May 20, 1890.

And whereas, E. Bement & Sons of Lansing, in the State of Michigan desires to acquire the right to use in its business in the manufacture at Lansing and sale throughout the United States of float spring tooth harrows, harrow frames without teeth and attachments applicable thereto, in its name under the aforesaid patents or some one or more of them and under all other patented rights owned or hereafter acquired by the National Harrow Company, which apply to and embrace the peculiar construction employed by E. Bement & Sons during the term of such patents, or any or either thereof, applicable to and embracing such construction.

11 Now therefore, know all men by these presents, that the National Harrow Company, licensor, has given and granted under the patents as aforesaid, and by these presents does give and grant under the patents as aforesaid to E. Bement & Sons the license and privilege of using the rights under the patents as aforesaid in its said business of manufacturing, marketing and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames, without teeth and attachments applicable thereto, a sample of which harrows, harrow frames and *and* attachments which said E. Bement & Sons is licensed to manufacture and sell, *are* in the possession of the treasurer of the National Harrow Company and marked and numbered as set forth in Schedule "A" made a part hereof. This license is granted upon following terms, viz:

First. E. Bement & Sons shall pay or cause to be paid to the National Harrow Company on the first day of September, 1891, as royalties the sum of one dollar for each and every float spring tooth harrow or float spring tooth harrow frame without teeth sold by it in pursuance of the strict terms of this license, between the time when this license is delivered and becomes operative and the first day of August, 1891, and shall pay annually thereafter on the first

day of September during the continuance of this license, a royalty of one dollar for each and every float spring tooth harrow, or float spring tooth harrow frame without teeth sold by it in pursuance of the strict terms of this license on the first day of September in each year thereafter, on all sales made prior to the first day of August preceding September of the year in which the royalty is payable; all of which royalties and sums provided by this agreement shall be payable at the office of and to the National Harrow Company in the city of Utica, N. Y.

12 Second. E. Bement & Sons agrees that between the 1st and 10th of each and every month during the continuance of this license, it will make verified reports to, and mail the same to the said National Harrow Company of sales of harrows, and harrow frames without teeth, stating the number of harrow- and harrow frames sold during the preceding month; and it further agrees to keep books in which it shall enter such sales, which books shall be open for inspection of the National Harrow Company, or any duly authorized agent, or attorney thereof, during business hours. The National Harrow Company may take statements or extracts from said books, and for the purpose of this license, a sale shall be considered as made when the harrows or harrow frames without teeth are shipped or delivered to the purchaser.

E. Bement & Sons agrees that it will not ship float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, to any person, firm or corporation to be sold on commission, or allow any rebate or deduction from the price or prices fixed in this license, except to settle with an insolvent debtor for harrows, harrow frames or attachments applicable thereto, previously sold or delivered.

Third. E. Bement & Sons agrees that it will not during the continuance of this license, sell float spring tooth harrows, float spring tooth harrow frames without teeth, or attachments applicable thereto, manufactured under this license, or for this licensee, by another licensee as herein provided at a less price, or on more favorable terms of payment and delivery to the purchasers, than is set forth in Schedule B, made a part of this license except as hereinafter provided.

Fourth. The National Harrow Company reserves the right to decrease the selling prices, and to make the terms of payment and delivery more favorable to the purchaser, and to reduce the

13 royalty on float spring tooth harrows, float spring tooth harrow frames, without teeth and attachments applicable thereto, manufactured under this license.

Fifth. The National Harrow Company agrees that it will furnish on request of E. Bement & Sons license labels at the price of ten cents each, in lots of not less than one hundred, and E. Bement & Sons agrees that it will affix one of said labels to each float spring tooth harrow, and to each float spring tooth harrow frame without teeth before shipping the same from its factory, and the amount paid for such labels by E. Bement & Sons shall be credited and allowed on the royalty at the time of payment of said royalty.

Sixth. E. Bement & Sons agrees that it will not during the continuance of this license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows or float spring tooth harrow frames without teeth or attachments applicable thereto, than those which it is licensed to manufacture and market under the terms of this license, except such as it may manufacture and furnish another licensee of the National Harrow Company and then only such constructions thereof as such other licensee shall be licensed by the National Harrow Company to manufacture and sell, except such other style and construction as it may be licensed to manufacture and sell by the National Harrow Company.

Seventh. E. Bement & Sons agrees to pay to the National Harrow Company for each and every float spring tooth harrow, float spring tooth harrow frame without teeth or attachments applicable thereto, manufactured or sold by it, contrary to the strict terms and provisions of this license, the sum of five dollars which is hereby agreed upon and fixed as liquidated damages therefor.

14 Eighth. E. Bement & Sons agrees that during the term of this license, it will not directly or indirectly in any way, deny or contest the validity of any of the patents applicable to and embracing the construction which it is licensed to manufacture, or that it may manufacture for another licensee, which said licensee is licensed to manufacture and sell, or the reissues thereof, or the sufficiency of the specifications thereof, of the validity of the title of such letters patent or reissues or the right of the National Harrow Company to make licenses to others and no act of either party shall invalidate this admission, and said E. Bement & Sons will not alter or change the construction of the float spring tooth harrow, float spring tooth harrow frames without teeth or attachments applied thereto, which it is authorized to manufacture and sell under this license, in any part or portions thereof which embody any of said inventions covered by such letters patent, or any of them, or any reissues thereof.

Ninth. It is further hereby covenanted and agreed by the National Harrow Company, to and with E. Bement & Sons, that the National Harrow Company will not, after this license is delivered and become operative, let grant or license any other person, firm or corporation, the right to manufacture and sell any float spring tooth harrow, float spring tooth harrow frame without teeth or attachments applicable thereto, of the peculiar style and construction, or embodying the peculiar features thereof, used by E. Bement & Sons in the float spring tooth harrow, or the float spring tooth harrow frame without teeth and attachments applicable thereto, as illustrated and embodied in the sample harrow now in the possession of the treasurer of the National Harrow Company, and referred to in Schedule A, made a part hereof.

Tenth. Nothing contained in this license shall be construed to authorize or permit E. Bement & Sons to manufacture or

15 vend, or procure to be manufactured or used, directly or indirectly, any other or different style of float spring tooth harrow, float spring tooth harrow frame without teeth or attach-

ments applicable thereto, than duplicates of such samples as deposited by it with, and in the possession of the treasurer of the National Harrow Company, and embraced in this license, or any part thereof, embraced in or forming a part of such invention described in the patents hereinbefore mentioned, or the reissues of such patents, except such portions thereof, as it may supply to another licensee of the National Harrow Company, which such other licensee shall be licensed to manufacture and sell.

Eleventh. Any departure from the terms of this license by the licensee may, at the option of the National Harrow Company, be deemed and treated as a breach of this license, and the licensee may be treated as an infringer; or the National Harrow Company may restrain the breach thereof in a suit brought in any court of competent jurisdiction, and may apply for and obtain an injunction restraining the further breach thereof, and the licensee waives the right of trial by jury, which remedy shall be in addition to the liquidated damages hereinbefore provided for.

Twelfth. The termination of this license by the National Harrow Company shall not release the licensee from its obligation to pay the royalties and sums hereinbefore provided for harrows and harrow frames without teeth and attachments applicable thereto, manufactured or sold by it up to the time of the termination of this license by said National Harrow Company, which royalties and sums shall thereupon become due and payable immediately.

Thirteenth. The National Harrow Company agrees to defend E. Bement & Sons in any suit brought for an alleged infringement on account of the manufacture or sale of float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, manufactured or sold under this license which it is licensed to manufacture or sell, and to pay any costs or damages recovered in said suit, provided it is notified of the suit, and allowed to appear and conduct the defense.

16

Fourteenth. No royalties or liquidated damages shall be paid to the National Harrow Company for float spring tooth harrows, float spring tooth harrow frames, without teeth or attachments applicable thereto, exported for use in a foreign country.

Fifteenth. This license is personal to the licensee and is not assignable by it or by operation of law, except to the successors of E. Bement & Sons in the same place and business, without the written consent of the licensor, nor shall the royalties or sums hereinbefore specified cease to be paid under any circumstances whatever except under the conditions named in this license, during the continuance thereof. This license applies only to float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto.

Sixteenth. It is agreed by and between the parties hereto, that this license shall continue during the term of the patent or patents applicable to and embracing the constructions licensed hereunder and during the term of any reissues thereof.

Seventeenth. The place of performance of this agreement shall be the city of Utica, N. Y., and this agreement shall be construed

and the rights of the parties thereunder determined according to the laws of the State of New York.

Eighteenth. This contract or license and each of the provisions therein contained, is made in consideration of one dollar paid by each of the parties to the other, the receipt of which is
17 hereby acknowledged and for value received by each from the other and the covenants therein contained to be performed by the other and shall apply to and bind the parties thereto, their successors, heirs and assigns.

SCHEDULE "A."

Nineteenth. This schedule embraces harrows, harrow frames without teeth and attachments applicable thereto, duplicates of which the licensee is authorized to manufacture, sell, use and vend to others to be used but always as licensee under the terms of this license.

1. A float spring tooth harrow, channel or I beam steel frame (Steel King) marked E. Bement & Sons, Lansing, Mich., dated Dec. 16, 1890. Number 14.

2. A float spring tooth harrow, wood frame lined without teeth marked E. Bement & Sons, Lansing, Mich., dated Dec. 16, 1890. Number 15.

3. A float spring tooth harrow marked number —.

4. A float spring tooth harrow marked number —.

SCHEDULE "B."

Twentieth. Prices and terms of sale under this license:

14-tooth steel frame and wood frame plated harrow.....	$23 00
16-tooth steel frame and wood frame plated harrow.....	23 00
18-tooth steel frame and wood frame plated harrow.....	25 00
20-tooth steel frame and wood frame plated harrow.....	27 50
22-tooth steel frame and wood frame plated harrow.....	28 50
24-tooth steel frame and wood frame plated harrow.....	32 00

For harrow frames complete less teeth, as follows:

14-tooth frame.....	$14 00
16-tooth frame.....	14 00
18-tooth frame.....	16 00
20-tooth frame.....	18 00
22-tooth frame.....	20 00
24-tooth frame.....	20 00

Intermediate sizes of harrows or frames shall be sold at the price of the next larger size.

Single tooth.....	$0 75

18 A maximum discount of forty-two (42) per cent. may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England States; also States of New

York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia.

A maximum discount of forty-five (45) per cent. may be allowed on all sales made in the territory throughout the United States not mentioned above.

Freight may be allowed to nearest railroad station or steamboat landing.

Terms on sales made prior to June 1st, four months from June 1st, less ten (10) per cent. discount for cash June 10th.

Terms of sales made after June 1st, four months from September 1st, less ten (10) per cent. discount for cash September 10th.

The licensee may sell harrows at retail to the local users of harrows at its place of business only, but at a price not less than the net schedule prices named.

In witness whereof, the parties have hereunto subscribed their names and affixed their seals this first day of April, 1891.

[L. S.] THE NATIONAL HARROW CO.,
By CHAS. H. CHILDS, *Pres't.*

[L. S.] E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

EXHIBIT "B."

License Contract.

Whereas, certain letters patent of the United States of America were issued to sundry parties and are now owned by the National Harrow Company a corporation organized and doing business at the city of Utica, in the county of Oneida, and State of New York,

19 for new and useful improvements relating to float spring tooth harrows, float spring tooth harrow frames, and attachments applicable thereto, and are numbered and dated as follows, to wit:

150,976, May 19, 1874.
197,703, Nov. 27, 1877.
205,449, June 25, 1878.
224,274, Feb. 10, 1880.
227,683, May 18, 1880.
233,718, Oct. 26, 1880.
239,947, April 12, 1881.
244,100, July 12, 1881.
245,718, Aug. 16, 1881.
251,208, Dec. 20, 1881.
264,360, Sept. 12, 1882.
271,938, Feb. 6, 1883.
284,278, Sept. 4, 1883.
309,416, Dec. 16, 1884.
327,340, Sept. 29, 1885.
348,544, Sept. 7, 1886.
359,539, March 15, 1887.
359,970, March 22, 1887.
197,515, Nov. 27, 1877.
201,946, April 2, 1878.
224,273, Feb. 10, 1880.
224,275, Feb. 10, 1880.
232,192, Sept. 14, 1880.
235,071, Dec. 7, 1880.
241,528, May 17, 1881.
245,033, Aug. 2, 1881.
250,065, Nov. 29, 1881.
262,918, Aug. 22, 1882.
272,939, Feb. 27, 1883.
266,348, Oct. 24, 1882.
278,287, May 22, 1883.
301,675, July 1, 1884.
309,800, Dec. 23, 1884.
337,951, March 16, 1886.
458,839, March 8, 1887.
359,969, March 22, 1887.

361,792, April 26, 1887.
367,462, Aug. 2, 1887.
371,902, Oct. 18, 1887.
374,159, Nov. 29, 1887.
375,511, Dec. 27, 1887.
378,081, Feb. 21, 1888.
382,304, May 8, 1888.
386,094, July 10, 1888.
390,065, Sept. 25, 1888.
392,312, Nov. 6, 1888.
393,156, Nov. 20, 1888.
396,696, Jan. 22, 1889.
399,731, March 19, 1889.
400,397, March 26, 1889.
401,833, April 23, 1889.
20 402,629, May 7, 1889.
405,459, June 18, 1889.
413,352, Oct. 22, 1889.
413,499, Oct. 22, 1889.
416,995, Dec. 10, 1889.
419,990, Jan. 21, 1890.
426,666, April 29, 1890.
428,310, May 20, 1890.
434,110, Aug. 12, 1890.
446,820, Feb. 17, 1891.

360,975, April 12, 1887.
362,626, May 10, 1887.
370,915, Oct. 4, 1887.
371,903, Oct. 18, 1887.
375,510, Dec. 27, 1887.
R. 10893, Jan. 10, 1888.
379,018, March 6, 1888.
386,021, July 10, 1888.
388,306, Aug. 21, 1888.
392,311, Nov. 6, 1888.
393,108, Nov. 20, 1888.
393,344, Nov. 20, 1888.
396,944, Jan. 29, 1889.
400,398, March 26, 1889.
402,079, April 23, 1889.
403,976, May 28, 1889.
405,580, June 18, 1889.
412,428, Oct. 8, 1889.
413,498, Oct. 22, 1889.
413,538, Oct. 22, 1889.
419,971, Jan. 21, 1890.
421,789, Feb. 18, 1890.
426,695, April 29, 1890.
428,329, May 20, 1890.

And whereas, E. Bement & Sons, of Lansing, in the county of Ingham and State of Michigan, is desirous of acquiring the right to use in — business in the manufacture at Lansing, Mich., and sale in all the territory embraced within the United States, lying south and west of Virginia, West Virginia and Pennsylvania, of float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto, under the aforesaid letters patent or some one or more of them under all other patented rights owned or hereafter acquired by the National Harrow Company, which apply to and embrace the peculiar construction employed by it during the term of said patents, or any or either thereof, applicable to and embracing such construction, and to vend the same to be used throughout all the territory embraced within the United States, lying south and west of Virginia, West Virginia and Pennsylvania.

Now therefore, know all men by these presents, that the National Harrow Company licensor has given and granted under the patents as aforesaid, and by these presents does give and grant under the patents as aforesaid to E. Bement & Sons licensee, the license and liberty of using the rights under the patents as aforesaid, in its said business of manufacturing, marketing and vending to others to be used in all of the territory embraced within the United States lying south and west
21 of Virginia, West Virginia and Pennsylvania, float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto, a sample of which harrows,

harrow frames and attachments applicable thereto, which said E. Bement & Sons is licensed to manufacture and sell, *are* in the possession of the treasurer of the National Harrow Company, and marked and numbered as set forth in Schedule A, made a part of this license.

This license is granted upon the following terms, viz:

First. E. Bement & Sons shall pay or cause to be paid to the National Harrow Company on the first day of September, 1891, as royalties the sum of one dollar for each and every float spring tooth harrow or float spring tooth harrow frame without teeth, sold by it in pursuance of the strict terms of this license, between the time when this license is delivered and becomes operative, and the first day of August, 1891, and shall pay annually thereafter on the first day of September, during the continuance of this license a royalty of one dollar for each and every float spring tooth harrow, or float spring tooth harrow frame without teeth sold by it in pursuance of the strict terms of this license, on the first day of September, in each year thereafter, on all sales made prior to the first day of August, preceding September of the year in which the royalty is payable; all of which royalties and sums provided by this agreement shall be payable at the office of, and to the National Harrow Company in the city of Utica, N. Y.

Second. E. Bement & Sons agrees that between the 1st and 10th of each and every month during the continuance of this license, it will make verified reports to, and mail the same to the said National Harrow Company of sale of harrows and harrow frames without teeth, stating the number of harrows and harrow frames sold during the preceding month by —; and it further agrees to
22 keep books in which it shall enter such sales, which books shall be open for inspection of the National Harrow Company, or any duly authorized agent or attorney thereof, during business hours. The National Harrow Company may take statements or extracts from said books and for the purpose of this license, a sale shall be considered as made when the harrows or harrow frames without teeth are shipped or delivered to the purchaser. E. Bement & Sons agrees that it will not ship float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, to any person, firm or corporation to be sold on commission, or allow any rebate or deduction from the price or prices fixed in this license, except to settle with an insolvent debtor for harrows, harrow frames or attachments applicable thereto, previously sold or delivered.

Third. E. Bement & Sons agrees that it will not during the continuance of this license, sell float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, manufactured under this license, or for this licensee by another licensee as herein provided at a less price, or on more favorable terms of payment and delivery to the purchasers than is set forth in Schedule B, made a part of this license, except as hereinafter provided.

Fourth. The National Harrow Company reserves the right to decrease the selling prices and to make the terms of payment and de-

livery more favorable to the purchaser, and to reduce the royalty on float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto, manufactured under this license.

Fifth. The National Harrow Company agrees that it will furnish on request to E. Bement & Sons license labels at the price of ten cents each, in lots of not less than one hundred, and E.
23 Bement & Sons agrees that — will affix one of said labels to each float spring tooth harrow, and to each float spring tooth harrow frame without teeth, before shipping the same from its factory, and the amount paid for such labels by E. Bement & Sons shall be credited and allowed on the royalty at the time of payment of said royalty.

Sixth. E. Bement & Sons agrees that it will not, during the continuance of this license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows or float spring tooth harrow frames without teeth, or attachments applicable thereto, than those which it is licensed to manufacture and marked under the terms of this license, except such as it may manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee shall be licensed by the National Harrow Company to manufacture and sell, except such other style and construction as it may be licensed to manufacture and sell by the National Harrow Company.

Seventh. E. Bement & Sons agrees to pay to the National Harrow Company for each and every float spring tooth harrow, float spring tooth harrow frame without teeth or attachments applicable thereto manufactured or sold by it contrary to the strict terms and provisions of this license, the sum of five dollars, which is hereby agreed upon and fixed as liquidated damages therefor.

Eighth. E. Bement & Sons agrees that during the term of this license it will not, directly or indirectly in any way, deny or contest the validity of any of the patents applicable to and embracing the construction which it is licensed to manufacture or that it may manufacture for another licensee, which said licensee is licensed to manufacture and sell, or the reissues thereof, or the sufficiency
24 of the specifications thereof or the validity of the title of such letters patent or reissues or the right of the National Harrow Company to make licenses to others and no act of either party shall invalidate this admission, and said E. Bement — Sons will not alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applied thereto, which it is authorized to manufacture and sell under this license in any part or portions thereof which embody any of said inventions covered by such letters patent or any of them, or any reissues thereof.

Ninth. It is further hereby covenanted and agreed by the National Harrow Company to and with E. Bement & Sons that the National Harrow Company will not, after this license is delivered and become operative, let, grant or license any other person, firm or corporation, the right to manufacture and sell any float spring tooth harrow,

float spring tooth harrow frame without teeth or attachments applicable thereto, of the peculiar style and construction or embodying the peculiar features thereof, used by E. Bement & Sons in the float spring tooth harrow or the float spring tooth harrow frame without teeth and attachments applicable thereto, as illustrated and embodied in the sample harrow now in the possession of the treasurer of the National Harrow Company and referred to in Schedule A made a part hereof.

Tenth. Nothing contained in this license shall be construed to authorize or permit E. Bement & Sons to manufacture or vend or procure to be manufactured or used, directly or indirectly any other or different style of float spring tooth harrow, float spring tooth harrow frame without teeth or attachments applicable thereto, than duplicates of such samples as deposited by it with and in the possession of the treasurer of the National Harrow Company
25 and embraced in this license, or any part thereof, embraced in or forming a part of such invention described in the patents hereinbefore mentioned or the reissues of such patents, except such portions thereof as it may supply to another licensee of the National Harrow Company which such other licensee shall be licensed to manufacture and sell.

Eleventh. Any departure from the terms of this license by the licensee may, at the option of the National Harrow Company, be deemed and treated as a breach of this license and the licensee may be treated as an infringer, or the National Harrow Company may restrain the breach thereof in a suit brought in any court of competent jurisdiction, and may apply for and obtain an injunction restraining the further breach thereof, and the licensee waives the right of trial by jury which remedy shall be in addition to the liquidated damages hereinbefore provided for.

Twelfth. The termination of this license by the National Harrow Company shall not release the licensee from its obligation to pay the royalties and sums hereinbefore provided for harrows and harrow frames without teeth and attachments applicable thereto, manufactured or sold by it up to the time of the termination of this license by said National Harrow Company which royalties and sums shall thereupon become due and payable immediately.

Thirteenth. The National Harrow Company agrees to defend E. Bement & Sons in any suit brought for an alleged infringement on account of the manufacture or sale of float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, manufactured or sold under this license which it is licensed to manufacture or sell, and to pay any costs or damages recovered in said suit providing it is notified of the suit and allowed to appear and conduct the defense.

26 Fourteenth. No royalties or liquidated damages shall be paid to the National Harrow Company for float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, exported for use in a foreign country.

Fifteenth. This license is personal to the licensee and is not assignable by it or by operation of law, except to the successors of

E. Bement & Sons in the same place and business, without the written consent of the licensor nor shall the royalties or sums hereinbefore specified cease to be paid under any circumstances whatever, except under the conditions named in this license, during the continuance thereof. This license applies only to float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto.

Sixteenth. It is agreed by and between the parties hereto, that this license shall continue during the term of the patent or patents applicable to and embracing the constructions licensed hereunder and during the term of any reissues thereof.

Seventeenth. The place of performance of this agreement shall be the city of Utica, N. Y., and this agreement shall be construed and the rights of the parties thereunder determined according to the laws of the *laws of the* State of New York.

Eighteenth. This contract or license and each of the provisions therein contained is made in consideration of one dollar paid by each of the parties to the other, the receipt of which is hereby acknowledged and for value received by each from the other and the covenants therein contained to be performed by the other and shall apply to and bind the parties thereto, their successors, heirs and assigns.

SCHEDULE "A."

27 Nineteenth. This schedule embraces harrows, harrow frames without teeth and attachments applicable thereto, duplicates of which the licensee is authorized to manufacture and sell to be used in all of the territory embraced within the United States lying south and west of Virginia, West Virginia and Pennsylvania under the terms of this license 1. A float spring tooth harrow, wood frame lined without teeth, marked E. Bement & Sons, Lansing, Mich., dated Dec. 16th, 1890, number 15 A.

2. A float spring tooth harrow marked number —.
3. A float spring tooth harrow marked number —.
4. A float spring tooth harrow marked number —.

SCHEDULE "B."

Twentieth. Prices and terms of sale under this license:

16-tooth wood frame plain harrow	$21 00
18-tooth wood frame plain harrow	23 00
20-tooth wood frame plain harrow	25 00
24-tooth wood frame plain harrow	30 00

For harrow frames complete, less teeth in the territory before mentioned, as follows:

16-tooth frame	$14 00
18-tooth frame	16 00
20-tooth frame	18 00
24-tooth frame	20 00

Intermediate sizes of harrows or harrow frames shall be sold at the price of the next larger size.

Single tooth $0 75

A maximum discount of forty-five (45) per cent. may be allowed on all sales made under this license.

Freight may be allowed to the nearest railroad station or steamboat landing.

Terms on sales made prior to June 1, four months from June 1, less ten (10) per cent. discount for cash June 10.

28 Terms of sale made after June 1, four months from September 1, less ten (10) per cent. discount for cash September 10.

The licensee may sell harrows in the territory before mentioned at retail to the local users of harrows at its place of business only, but at a price not less than the net schedule price named.

In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals this first day of April, 1891.

[L. S.] THE NATIONAL HARROW COMPANY,
By CHAS. H. CHILDS, *President.*

[L. S.] E. BEMENT & SONS,
By A. O. BEMENT, *President.*

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

The plaintiff for an amendment to the existing complaint in this action, by permission of the referee and the agreement of the parties, and the conforming of the same to the proof, hereby amends the complaint in the following particulars:

Cancel the "sixth" paragraph of the complaint and substitute in place thereof as follows:

"Sixth. That this defendant and this plaintiff have conducted their business, with reference to the license contracts, and this plaintiff has lived up to all of the requirements thereof. That the defendant has failed, neglected and refused to live up to the requirements of the same."

29 Strike out the "eighth" clause of the complaint from the beginning thereof, down to the word "viz." and insert in place thereof as follows:

"Eighth. That on and prior to the 1st day of August, 1893, the defendant reported to the plaintiff, 13,900 harrows sold in accordance with the license contracts, and paid royalty on the same. That in making and serving the said verified reports, the defendant failed, neglected and refused to report all of the float spring tooth harrows and float spring tooth harrow frames which it had sold, and omitted to pay the royalty on the same. That the defendant, in fact, has sold and delivered float spring tooth harrows, float spring

tooth harrow frames and attachments applicable thereto, to the number of 18,097, between the 10th of September, 1890, and the 1st day of January, 1895. That, upon information and belief, the plaintiff alleges that all of these harrows have been sold and settled for a less prices and on more favorable terms to purchasers than the prices specified and contained in the license contracts. That the defendant has failed, neglected and refused to perform the stipulations and conditions to be performed on its part, and has violated, and is violating and intends to violate the stipulations and conditions agreed to be done and performed on its part in the following particulars."

Just prior to the "ninth" clause of the complaint, insert as follows:

"(*h.*) That the defendant has sold and delivered and is now selling and delivering float spring tooth harrows and float spring tooth harrow frames during the lifetime of the license, to purchasers at less prices and on more favorable terms of payment than those which it was authorized to sell, and has sold other and different styles and constructions of float spring tooth harrows and float spring tooth harrow frames than those which it was licensed to manufacture and sell, to wit: it has sold, on or prior to January 1st, 1895, 3,026
30 "Clipper" harrows, complete, whereas it was only authorized to sell "Clipper" wood frame unlined harrows without teeth; that it has sold and delivered float spring tooth harrows and float spring tooth harrow frames which it was not authorized to sell, known as the "Reliance" harrow, to the number of six; that it has sold and delivered "Ajax" lever float spring tooth harrows which it had not been licensed to manufacture and sell, which were float spring tooth harrows, prior to January 1st, 1895, to the number of 2,849; that the defendant has sold other float spring tooth harrows and float spring tooth harrow frames, known as the "Lansing" harrow prior to January 1st, 1895, to the number of 392."

Add and insert as follows:

Eleventh. At the time of the execution and delivery of the license contracts, the National Harrow Company of New York purchased from the defendant certain U. S. letters patent relating to harrows, which it was then manufacturing, for which the National Harrow Company of New York paid to the defendant, in its paid-up stock, the sum of $46,200; and a certain license contract based upon letters patent of the United States, granted by Charles La Dow to the defendant, was also sold and assigned to the said National Harrow Company of New York, for the consideration aforesaid. And the defendant, being desirous not only of using the patents which it had assigned, but also the patents owned by the said New York corporation, which were embodied and stated in the license contracts, entered into contracts "A" and "B" which were part and parcel of the same transaction; and the said defendant now holds the stock of this plaintiff, substituted for the stock of the National Harrow Company of New York, on which it has received regular annual dividends up to the year 1894. And the defendant has never abandoned the manufacture and sale of harrows under the license
31 contracts, but is now using the same. And the defendant is,

by its acts and conduct, estopped from questioning the validity of the license contracts."

"Twelfth. The plaintiff alleges that wherever the words "float spring tooth, float spring tooth harrow frame and attachments applicable thereto" appears in the license contracts or in this complaint, that the same *was* intended to, and did, embrace every style and variety of harrow employing curved teeth, excepting only, wheel harrows as constructed at the date of the license contracts, which consisted in supporting the frame bars and teeth from the under side of the axletree which carried wheels at either end of more than two feet in diameter."

RISLEY, ROBINSON & LOVE,
Attorneys for the Plaintiff.

Office and post-office address, Herald building, Utica, N. Y.

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

On reading the complaint in this action, duly verified also, the affidavits of Warren M. Brinkerhoff, Orlando J. Childs, Charles H. Childs, J. H. Wilhelm, Emmet Coleman and J. B. Wilson, showing that a cause of action exists in favor of the plaintiff against the defendant, as set forth in the complaint, founded upon a written contract, signed, executed and delivered by both parties, now in force, which the plaintiff is ready and willing to perform, but which the defendant has neglected, refused and still neglects and refuses to carry out and perform on its part, and that the defendant is
32 doing, procuring to be done, or suffering to be done, acts and transactions which are in contravention of the contract rights of the plaintiff; and that a repetition and continuance of said breaches of the contract by the defendant, unless restrained by the order of the court, will work irreparable injury and damage to the plaintiff and involve the plaintiff in a multiplicity of suits to redress such breaches, and it further appearing that the defendant, in and by the terms of said written contract, consented in writing that it might be restrained from any violation of the contract on its part, by an injunction, in the event of its not complying with the requirements of the contract.

Now therefore, on application of Messrs. Risley, Robinson & Love, attorneys for the plaintiff, it is

Ordered, that the defendant, E. Bement & Sons and their attorneys, counselors, agents, assistants and employés, and each and every of them, is, under penalty by law prescribed, enjoined and restrained, until the further order of this court, in the premises, from doing, suffering to be done, procuring or suffering to be procured or to be done, any act or thing, whatsoever in contravention of, or in violation of the stipulations contained in the license con-

tracts attached to the bill of complaint, and which is marked "Exhibit A and B," and the defendant is hereby enjoined from selling, offering for sale, delivering, offering for delivery, any harrow, or any harrow frame, without the license label of the National Harrow Company affixed thereto; and the defendant is likewise enjoined and restrained from selling, offering for sale, any harrow or harrow frame in any manner differing from the harrow and harrow frames which they are licensed to build; duplicate of which *are* in the possession of the plaintiff as a sample which they are licensed to manufacture and sell; and it is also enjoined and restrained from selling, offering for sale, delivering, offering for delivery, harrows
33 or harrow frames, for a less price or upon more favorable terms to purchasers, than those specified in the license contracts, as established by the National Harrow Company, until the further order of the court.

Dated, September 21, 1894.

W. T. DUNMORE,
Oneida County Judge.

STATE OF MICHIGAN, } ss:
County of Ingham, }

Frank C. McEuen, being duly sworn, says that he is sheriff, that on the 6th day of December, 1894, at Lansing, he served the within order (and notice) on Arthur O. Bement, president of the corporation of E. Bement & Sons, and that he knew the said Arthur O. Bement is the president of the corporation of E. Bement & Sons.

FRANK C. McEUEN, *Sheriff.*

Sworn to and — before me this 10th day of December, 1894.

H. J. BOND,
Notary Public, Ingham County, Mich.

Notary public certificate. News print, Mason.

STATE OF MICHIGAN, } ss:
County of Ingham, }

I, James Blackmore, clerk of the county of Ingham and clerk of the circuit court for said county, which is a court of record, having a seal, do hereby certify that Horatio J. Bond, whose name is subscribed to the certificate of the proof of acknowledgement of the annexed instrument, and therein written, was at the time of taking such proof of acknowledgement, a notary public in and for said county, duly commissioned and qualified, and duly authorized to take the same; and further, that I am acquainted with the handwriting of such notary public, and verily believe the signature to the said certificate of proof of acknowledgement is genuine.
34 I further certify that said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, at Mason this 10th day of December, 1894.

[L. S.] JAMES BLACKMORE, *Clerk.*

Supreme Court, Oneida County.

NATIONAL HARROW COMPANY }
vs.
E. BEMENT & SONS. }

The defendant above named for answer to the complaint of the plaintiff herein pleads and alleges as follows:

First. Defendant admits that the plaintiff and defendant are corporations as in the complaint alleged.

Second. Defendant admits that the National Harrow Company of Utica, N. Y. was a corporation as alleged in said complaint.

Third. Defendant admits that the said National Harrow Company of Utica, N. Y. entered into the alleged license contracts "A" & "B" with the defendant as alleged in said complaint, but says that the agreements for said alleged licenses A and B were a part only and were made in pursuance of another agreement hereto annexed and marked "Exhibit 1," before that time entered into between the plaintiff and divers other persons, the purpose, object and intent of which was, to limit, control and regulate the amount and quantity of production of the float spring tooth harrows to be manufactured and sold in the United States, and to regulate and control the market price thereof, as hereinafter shown.

And defendant admits that on or about the 9th day of Sep-
35 tember, 1891, said National Harrow Company of New York and said National Harrow Company of New Jersey entered into the agreement which is referred to in the complaint in this action, a copy of which is annexed to said complaint and marked "Agreement" and signed by the National Harrow Company by H. H. Durr, president, Charles A. Long, treasurer, and also by the National Harrow Company of Utica, by Charles H. Childs, president and Edward Norris, treasurer. But said defendant alleges that it has not sufficient knowledge or information to form a belief as to whether or not said agreement was operative and whether or not it transferred to the National Harrow Company of New Jersey all the patents and interests in patents applicable to spring tooth harrows or any part thereof, and all applications then pending, covering spring tooth harrows or parts thereof, or all money merchandise, licenses, agreements, contracts and property of every name and nature, except $1,000 in cash, or all the claims and rights of action owned by the said National Harrow Company of Utica, N. Y., to said National Harrow Company of New Jersey, and therefore denies the same.

Defendant further denies on information and belief, that all the rights, title and interest which said The National Harrow Company of Utica had in the alleged license contracts set out in the complaint herein as Exhibits "A" and "B" were transferred by said The National Harrow Company of Utica to said National Harrow Company of New Jersey.

Fourth. Defendant admits that it performed all the stipulations contained in the said alleged license contracts A and B and lived

up to the requirements thereof up to the first day of August, 1893, but defendant denies on information and belief, that said National Harrow Company of New Jersey performed the stipulations contained in said alleged license contracts and lived up to the requirements thereof on its part, prior to said first day of
36 August, 1893, and defendant denies upon information and belief, that said National Harrow Company of New Jersey has performed all of the stipulations, conditions and agreements to be done and performed on its part as assignee of said alleged license contracts A and B or that the said National Harrow Company of New Jersey is ready or willing to perform all of the said stipulations and requirements on its part.

Fifth. Defendant further answering said complaint admits that it has not signed and verified reports and mailed the same to the National Harrow Company of New Jersey of the sales of harrows, harrow frames, and attachments applicable thereto between the first and tenth day of each month, since the first day of August, 1893. Defendant also admits that since that time it has made no reports and that it has sold and delivered a large number of harrows, harrow frames, and attachments applicable thereto, but defendant denies that said harrows so manufactured and sold by it were covered by said alleged licenses A and B, or that any part of or attachment to said harrows were covered by said alleged licenses A and B or by any patent owned or claimed to be owned by the plaintiff.

Defendant further admits that it has kept books in which it has entered its sales of harrows, harrow frames and attachments applicable thereto, that it has refused and still does refuse to allow the plaintiff or its duly authorized agent to inspect, during business hours, said books, and that it has refused and still does refuse to allow extracts to be taken from their said books for the information of the plaintiff, and defendant further alleges that said books contained entries of sales of harrows and harrow frames, and attachments applicable thereto, very few of which are even in form covered by the alleged licenses A and B referred to in the complaint herein.
37 Defendant further denies that it has sold to J. H. Wilhelm, of Myerstown, Pa., any harrows to be sold on commission, or that it has sold to said Wilhelm, since the first day of August, 1893, any harrows, which harrows or any part thereof, or attachments thereto, were covered by the alleged licenses A and B referred to in the complaint herein. Defendant denies that it has allowed any rebates or discounts to said Wilhelm on any harrows covered by the said alleged licenses.

Defendant denies that it has sold on commission any harrows covered by said alleged licenses A and B to Coleman & Horton, of Nichols, Tioga county, N. Y., nor has said defendant allowed any rebates or discounts upon any harrows covered by said alleged licenses A and B sold to said Coleman & Horton, or any other person or persons except as will hereafter more fully appear in this answer.

Defendant further alleges that as it is informed and verily believes the harrows sold to said Coleman & Horton and said Wilhelm were

"Ajax" lever harrows and not float spring tooth harrows, and that so far as defendant is notified said Wilhelm had two harrows known as Steel Kings, as stated in the affidavit of said Wilhelm dated June 19, 1894, in this action.

Defendant further admits that plaintiff has kept on hand labels to be placed upon harrows for those who desire the same, but that defendant has not placed any labels upon such harrows as it has manufactured or sold and which are not float spring tooth harrows.

Defendant further answering said complaint admits that it has manufactured and sold and has now on hand for sale and intends to sell other and different harrows, harrow frames and attachments applicable thereto, and other and different constructions from those referred to in said alleged license contracts A and B, and that said defendant has manufactured and sold a number of lever
38 harrows employing curved teeth, known and designated by defendant in its trade as the "Ajax" harrow, and that said harrows have not been manufactured or sold or furnished any licensees of this plaintiff, but defendant denies that said harrows are float spring tooth harrows or that said harrow is covered by said alleged license contracts A and B set forth in the complaint.

Sixth. Defendant further answering said complaint, denies that by reason of any breaches of the conditions of the alleged license contracts A and B hereinbefore referred to, the defendant is liable to account to plaintiff for any harrows sold or delivered by it, or pay to said plaintiff any damages, either liquidated or otherwise.

Seventh. Defendant further answering said complaint, denies that it has violated the eighth clause of said alleged license contracts, or that it has altered or exchanged the construction of the harrow, harrow frame, or attachments applicable thereto, such as referred to in said alleged licenses, or that they are now manufacturing, selling, offering for sale, or that they have on hand any such harrows altered from those covered by the terms of said alleged license contracts. But defendant admits and alleges that it is now and has been manufacturing and selling harrows which are not covered by said alleged license contracts A and B, nor is any part of said harrows or any attachments thereto covered by said alleged license contracts A and B.

Eighth. Defendant further answering said complaint denies that it has violated the tenth clause of said alleged license contracts, or that it has permitted or authorized, or procured to be manufactured other or different styles of float spring tooth harrows than duplicates of the sample harrows which the defendant deposited with, and which are now in the possession of the secretary of the plaintiff as the sample harrows, duplicates of which the defendant was
39 authorized to manufacture and sell by said alleged license contracts A and B, but defendant alleges that the harrows which it has manufactured, authorized or permitted to be manufactured or sold are not covered by said alleged license contracts A and B, or by any patent owned by said plaintiff.

Defendant denies that it has any harrows which are covered by

said alleged license contracts A and B, which have been altered in violation of the tenth clause of said license contracts.

The defendant admits and alleges that it has on hand, harrows entirely different in form and construction than duplicates of those which were deposited with the secretary of said plaintiff. But defendant alleges that none of said harrows or parts thereof, or attachments thereto are covered by said alleged license contracts A and B, except such harrows as are known as the "Steel King" and one known as "Wood frame lined. without teeth," a very few of which defendant has manufactured and sold, or offered for sale since the first day of August, 1893.

Ninth. For further answer to the said complaint, in regard to the sale of harrows referred to in said complaint which plaintiff alleges were sold in violation of the terms of the alleged license contracts A and B, defendant alleges that the defendant sold harrows through traveling agents, whose salaries were based upon the amount of goods sold by them, and that the agreements with such agents are that they shall make no rebate or allowance of any kind exceeding two dollars upon each harrow, and that if said traveling agents make any allowance to a customer from the prices fixed upon the specific harrows as set forth in said alleged license contracts A and B, said allowances shall be taken in full from the salaries which otherwise would be allowed to said traveling agents. Defendant alleges on information and belief that no allowance has ever been made by it of more than two dollars per harrow.

Tenth. For further answer to said complaint defendant alleges that it has attached to the harrow known as "Steel King" and the harrow known as "Wood frame lined, without teeth," the labels provided for in said alleged license contracts A and B, but that none of the said labels have been attached to any other harrows manufactured or sold by said defendant since the first day of August, 1893. And defendant further denies that it has manufactured or sold or offered for sale, or has on hand for the purpose of offering the same for sale any float spring tooth harrows, harrow frames without teeth, or attachments applicable thereto, except the "Steel King" and the harrow known as "Wood frame lined," referred to in said alleged contracts A and B. And defendant denies upon information and belief that it has made, manufactured, sold or offered for sale any harrow of any kind, except those mentioned in said alleged contracts A and B, and such as were not float spring tooth harrows or float spring tooth harrow frames without teeth or attachments applicable thereto.

Eleventh. For a further defense to the complaint of the plaintiff herein, defendant alleges that some time in the year of 1891, a number of persons and copartnerships and corporations among which were C. H. Childs & Company of Utica, N. Y., D. C. & H. C. Reed of Kalamazoo, Mich., D. B. Smith & Company of Utica, N. Y., the Farmers' Friend Manufacturing Company of Dayton, Ohio, George Sweet & Company of Dansville, N. Y., the Walker Manufacturing Company of Moravia, N. Y., L. C. Lull & Company of Kalamazoo,

Mich., the Herndeen Manufacturing Company of Geneva, N. Y., the Williams Manufacturing Company of Kalamazoo, Mich., D. O. Everest & Company of Pine Grove Mills, Mich., Childs &
41 Jones of Utica, N. Y., the McSherry Manufacturing Company of Dayton, Ohio, A. W. Stevens & Company of Auburn, N. Y., Taylor & Henry of Kalamazoo, Mich., W. S. Lawrence of Kalamazoo, Mich., the Eureka Mower Company of Utica, N. Y., Hench & Dromwold of York, Pa. and the defendants herein, entered into an agreement which, at the time all of said persons, copartnerships and corporations believed would be for the benefit of themselves and also for the benefit of the public generally; that said agreement or a copy thereof in blank, which was filled up with the names of the respective parties is hereunto — and marked "Exhibit 1." That the Clipper Chilled Plow Company of Elmira, N. Y. being a partnership consisting of William Strait and others signed one of said agreements for the purpose of becoming a member of said association known as the National Harrow Company but that said chilled plow Co. thereafter believing said agreement to be illegal and void upon the ground that it was against public policy and in restraint of trade brought an action against the National Harrow Company of Utica, N. Y. and others in this court in Chemung county, to have said contract "Exhibit 1" declared null and void and of no effect; that such action was tried before Hon. Walter Loyd Smith one of the justices of the supreme court at a special term. That said court decided in said action that said contract "Exhibit 1" was null and void and of no effect upon the ground that it was against public policy and in restraint of trade, as defendant is informed and verily believes.

Defendant further alleges that thereafter the said National Harrow Company of Utica, N. Y., and all the parties above referred to who entered into said contract "Exhibit 1," entered into a further agreement in regard to the matters referred to in said contract "Exhibit 1," and that the promises, agreements and covenants then
42 made by said parties are embodied in the alleged license contracts "Exhibits A and B" referred to in the complaint herein. And that said alleged license contracts "A and B" were made in continuation of the prior existing arrangements between all of said parties, except as said alleged license contracts "Exhibits A and B" differ in their provisions from said contract "Exhibit 1."

That since said alleged licenses A and B were granted as aforesaid the price of iron and steel, which enter largely into the construction of said harrows, has fallen in the market and this defendant and other manufacturers of harrows are able to manufacture said harrows at a less cost than at the time said licenses were granted, and this defendant submits that the purchaser of said harrows and the trade generally should be entitled to the benefit of such lower cost of production, and that it is against public policy and in restraint of trade that the prices of said harrows should be kept up to the point at which they were required to be sold at the time said alleged licenses were made.

Defendant further alleges upon information and belief that the

original agreement contained in the contract "Exhibit 1," and said alleged license contracts "Exhibits A and B" made in pursuance thereof are void and of no effect for the reason that the same are against public policy and in restraint of trade, and for the further reason that the making of the said alleged license contracts was in the furtherance of an illegal agreement between all persons, copartnerships and corporations above mentioned assenting to said alleged license contracts "A and B," by which said agreement said parties constituted themselves into a trust for the purpose of controlling the price of float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto, which said parties had no right to do and further that the following-named parties are corporations and that the acts of such corporations in assent-
43 ing to said alleged license contracts "A and B" were *ultra vires* and void. The names of such corporations are as follows, as defendant is informed and verily believes, viz:

The Farmers' Friend Manufacturing Company, The Walker Manufacturing Company, The Herndeen Manufacturing Company; The McSherry Manufacturing Company, The Eureka Mower Company and the defendant herein.

That at the time of entering into the original agreement between the said National Harrow Company of Utica, N. Y., and this defendant and the other parties to said agreement, it was understood and agreed that all of the parties manufacturing harrows under license from the National Harrow Company should pay a uniform royalty of one dollar upon each harrow so manufactured and sold, and licenses were granted to each of said parties upon that basis.

That since said alleged licenses "A and B" were granted, the National Harrow Company has, in violation of the letter and spirit of said alleged agreement, granted its licenses to certain manufacturing companies to manufacture harrows at lower rates or prices than those fixed in the said alleged licenses "A and B" given to this defendant, and has thereby unjustly discriminated against this defendant to the injury of this defendant, so that the defendant is unable to continue to pay the license fees agreed to be paid in said alleged licenses "A and B" and do business in competition with companies manufacturing under lower licenses.

Defendant further alleges that at some time during the year of 1893, but prior to the first day of August of said year, the Standard Harrow Company of New Jersey was organized and that said Standard Harrow Company acquired a majority of the capital stock of the said National Harrow Company of New Jersey and that said Standard Harrow Company still owns said capital stock
44 and thereby is able to and still does absolutely control the election of directors and officers of said National Harrow Company of New Jersey, and that the officers and directors of said Standard Harrow Company and National Harrow Company of New Jersey are largely made up of the same persons and that the said Standard Harrow Company is a manufacturer of and dealer in spring tooth harrows to a very large extent and that their principal place of business is at Utica in the State of New York, and that the

Standard Harrow Company is a licensee of said National Harrow Company of New Jersey and that all its spring tooth harrows are manufactured and sold under said licenses of said National Harrow Company of New Jersey as defendant is informed and verily believe-; that said National Harrow Company has conducted its business, since the first day of August, 1893, and still is conducting its business in a way to favor said Standard Harrow Company and against all other persons who manufacture and deal in spring tooth harrows in the United States, and that said plaintiff has allowed other licensees than the defendant herein to sell spring tooth harrows at less than the prices mentioned in the alleged license contracts "Exhibits A and B" and has taken less royalty from said persons than was exacted of defendant herein, as defendant is informed and verily believes; that said defendant is informed and verily believes said plaintiff has made an agreement with D. M. Osborne & Company or the Osborne Manufacturing Company of Auburn, N. Y., to allow said company to sell spring tooth harrows upon a royalty of about fifty cents per harrow, in violation of the terms and conditions of the alleged license contracts "Exhibits A and B" and in violation of the by-laws and resolutions of the National Harrow Company of New Jersey, which provide, as defendant is informed and verily believes, that no licensee of said National Harrow
45 Company should be licensed to manufacture or sell harrows at a less royalty than one dollar for each harrow or harrow frame without teeth, all of which was relied upon by defendant while it signed the alleged contracts A and B.

Defendant alleges on information and belief that plaintiff has waived in the case of the Standard Harrow Company, the collection of royalties, and that up to date they have not collected royalties due the National Harrow Company from the Standard Harrow Company, and that the officers of the National Harrow Company are also largely the officers of the Standard Harrow Company.

Defendant also alleges on information and belief, that the Standard Harrow Company has in many instances sold harrows at less than the agreed price, and that the National Harrow Company officers also being officers of the Standard Harrow Company, are well acquainted with the facts, and that notwithstanding their certain knowledge of the cutting of prices by the Standard Harrow Company, they have instituted no suit or proceeding to prevent the same, but have connived at their doing so.

Defendant further alleges that at about the same time that "Exhibit 1" was prepared to be signed by the parties hereinbefore mentioned, it was also agreed that a corporation should be formed under the laws of the State of New York, known as the National Harrow Company, and that all the patent rights and applications therefor owned or controlled by any of such persons, copartnerships or corporations should be turned over and assigned to said National Harrow Company, and that the capital stock of said National Harrow Company should be issued to such persons, copartnerships or corporations respectively, or for the benefit of the corporations to some

individual who should hold the stock of the respective corpo-
46 ration-, as the trustee for the same in payment for such patent rights and applications as were thus assigned and transferred to said National Harrow Company in pursuance of such agreement, and that as a matter of fact such agreement was carried out and the stock of said National Harrow Company of New York was issued to the persons, copartnerships and corporations in payment for such patent rights and applications for patents, as they respectively turned over to said National Harrow Company, and that said National Harrow Company is the same as that referred to in the complaint herein as "the National Harrow Company of Utica, N. Y."

Defendant further alleges that as it is informed and verily believes the stock awarded to Eureka Mower Company of Utica, N. Y., was issued to Edward Norris with the understanding that he hold the same for the benefit of Eureka Mower Company, and that the stock of the Walker Manufacturing Company was issued to W. V. Walker as trustee for said company, and the stock of the Herndeen Manufacturing Company was issued to Edward W. Herndeen as trustee for said company, and the stock was issued to Arthur O. Bement individually for the defendant herein, all of which defendant alleges was contrary to the public policy and void as defendant is informed and believes.

Twelfth. Defendant further alleges upon information and belief that the Pitts Agricultural Works of Buffalo, N. Y., is a licensee of said plaintiff under a license contract similar to the alleged license contracts A and B; that said Pitts agricultural works is a manufacturer and dealer in spring tooth harrows, and that since the first day of August, 1893, it has manufactured and sold and offered for sale several thousand spring tooth harrows, many of which are float spring tooth harrows, also harrow frames without teeth and attachments thereto belonging; that said Pitts agricultural works
47 has sold many of said harrows for less than the prices fixed upon specific harrows by said alleged license contracts A and B, and also as fixed in the license contracts between said plaintiff and said Pitts agricultural works; that said Pitts agricultural works has failed to pay the royalty to said plaintiff on said harrows, and that said plaintiff has taken no proceedings to collect said royalties or to enforce said contracts between it and said Pitts agricultural works, but said National Harrow Company has permitted said Pitts agricultural works to violate the express terms of said license contracts with it, and to effect the public market and the prices at which float spring tooth harrows, harrow frames and attachments thereto, can be sold to the great injury of defendant.

Thirteenth. For further answer to the complaint of plaintiff, defendant alleges upon information and belief, that none of the patents referred to and set out in the alleged license contracts A and B cover any of the harrows made or sold by defendant since the first day of August, 1893, nor do they cover any part of said harrows or any attachment thereto.

Defendant further answering said complaint alleges that in the

manufacturing and sale of any harrows manufactured or sold by it defendant has not infringed any of the plaintiff's lawful patent rights in the premises or any of said letters patent set out in said complaint.

Fourteenth. Defendant further alleges that notwithstanding said alleged contracts "Exhibits A and B" and if the same had never been signed by defendant, it would have had the legal right to manufacture and sell and deal in any of the harrows manufactured, sold or dealt in by it, and also in every part thereof and every device or application thereto in any way attached or belonging.

Fifteenth. Defendant further denies that in its business of manufacturing or selling harrows it has employed any harrows,
48 device, machinery, appliances or any other thing covered by any of the letters patent set forth in said alleged license contracts A and B. And the defendant further denies that by manufacturing, selling and dealing in harrows, harrow frames without teeth, or attachments thereto, it has in any way interfered with or violated the rights of the plaintiff herein.

Sixteenth. Defendant further alleges that it is a corporation duly incorporated under the general statutes of the State of Michigan providing for the organization of corporations and as a defense to the causes of action set out in the complaint herein, defendant pleads the statutes of the State of Michigan providing that a corporation shall not enter into any agreement, combination or trust with any other corporations or companies, and which said statute is known as act No. 225 of the Session Laws of the State of Michigan for the year 18— and is entitled "An act declaring contracts, agreements, undertakings and combinations unlawful and to provide punishment for those who shall enter into the same or do any act in performance thereof" approved July 1, 1889.

Seventeenth. Defendant for further answer alleges on information and belief, that said plaintiff is a corporation organized under the general law of the State of New Jersey, providing for the organization of corporations, and that it was organized for the purpose of making, purchasing and selling manufactured articles and also of acquiring and disposing of rights to make and use the same, but that said plaintiff has never manufactured or made any articles of any kind, although, it has had a corporate existence for more than three years, as defendant is informed and verily believes, and that its corporate rights have therefore ceased.

Eighteenth. For a further answer to the complaint herein
49 defendant denies each allegation thereof not hereinbefore admitted, specifically denied or otherwise answered.

COOKINHAM & SHERMAN,
Defendant's Attorneys, 21 Mann Building, Utica, N. Y.

STATE OF MICHIGAN, } ss:
County of Ingham, }

A. O. Bement being duly sworn, says that he is the president of the corporation of E. Bement & Sons, the defendant herein, and

that the reason defendant does not make this verification is that it is a corporation. Deponent further says that he has read the foregoing answer and knows the contents thereof, that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes the same to be true.

A. O. BEMENT.

Subscribed and sworn to before me this 3d day of November, 1894.

CLARA A. CARROLL,
Notary Public, Ingham County, Mich.

STATE OF MICHIGAN, } ss:
County of Ingham, }

I, James Blackmore, clerk of the county of Ingham and clerk of the city court for said county, which is a court of record having a seal, do hereby certify that Clara A. Carroll, whose name is subscribed to the certificate of the annexed affidavit, and therein written, was at the time of taking the same a notary public in and for said county, duly commissioned and qualified, and duly authorized to take the same; and further, that I am acquainted with the handwriting of such notary public, and verily believe the signature to the said certificate is genuine. I further certify that said instrument is executed according to the laws of this State.

50 In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county at Mason, this third day of November, 1894.

[L. S.] JAMES BLACKMORE, *Clerk.*

"EXHIBIT 1."

Agency.

To all whom it may concern:

Be it known that the National Harrow Company, a corporation organized under the laws of the State of New York, and having its principal place of business at the city of Utica, in said State, in consideration of the faithful and continuous performance of the stipulations herein specified, and in consideration of one dollar to it in hand paid by —— —— of —— in the State of —— and of other benefits and advantages accruing, and which are hereafter to accrue, and of the acceptance by the said —— —— of all the terms and conditions of the agency hereby granted by the National Harrow Company, the said National Harrow Company hereby grant unto said —— —— of —— in the State of —— the agency and license to manufacture float spring tooth harrows under any and all patents owned, and which may hereafter be owned by the National Harrow Company, with the right and privilege to use said patents, or such as are applicable to the harrows hereby authorized to be manufactured and sold, the National Harrow Company hereby authorize, as its agent and licensee, the said —— —— to manufacture, sell

and use and vend to others to be used, certain styles of float spring tooth harrows hereinafter mentioned, and no others; but
51 said agency and license is granted and accepted upon the express conditions precedent, and not subsequent, as follows:

First. The said —— —— is hereby exclusively authorized, as the agent and licensee of the National Harrow Company to manufacture, sell, use, and vend to others to be used, throughout all of the territosy of the United States, float spring tooth harrows, duplicates of each to be furnished, and kept in the possession of the National Harrow Company as samples of the harrows, before the same are put upon the market, duplicates of which harrows the said —— —— is authorized to manufacture and sell, as agent and licensee under the terms hereinafter mentioned, and in accepting this agency and license, it is expressly understood that the National Harrow Company does not assume any risks or liabilities whatever in respect to the manufacture and sale of said harrows, but all risks and liabilities of every name, *is* assumed by the said —— —— agents and licensees except as otherwise specifically provided in this contract. The intent being to grant to the said —— —— the exclusive right to manufacture the same styles and constructions of harrows heretofore manufactured and marketed by and to use the trade-marks or designs theretofore used by (but now owned by the National Harrow Company.) And also *to* those not now manufacturing an unlined wood frame harrow, are hereby authorized to manufacture and market, as agent of the National Harrow Company, one type of wood frame unlined float spring tooth harrow, which shall not employ the peculiar features of the tooth-fastening clips of any other agent, unless the said —— —— was just prior to the sale of — harrow business to the National Harrow Company using the same style and construction of tooth-fastening device in which case the right
52 to continue its use is hereby granted, providing always, that no unlined wood frame float spring tooth harrow shall be sold or used or imported for sale or use, in the territory of the New England States, New York, New Jersey, Delaware, Maryland, Virginia and West Virginia. The unlined wood frame harrows shall be subject to all the other terms of this agency and license.

The said —— —— shall, before placing the harrows on the market leave a duplicate sample harrow or harrows with the treasurer of the National Harrow Company.

Second. The said —— —— may manufacture and sell duplicate harrows like the sample furnished, which — are licensed to manufacture and market as agents and licensees, but upon — own credit and responsibility, and not upon the account, credit or responsibility of the National Harrow Company in any event, and — agree to make monthly reports of sales between the first and tenth day of each and every month, showing the number of harrows sold during the preceding month, which reports are to be uniform with all other agents and licensees of the National Harrow Company and shall be verified; and — agree to keep books in which the entries shall be made in such shape that the treasurer of the National Harrow Company may inspect the same, for the purpose of ascertaining

and verifying the number of harrows sold, and the price at which they are sold, and the amount of freight allowed; which books shall always be open for the inspection of the treasurer of said corporation during business hours, or by a committee of the board of trustees, and either or both are authorized to take statements or extracts therefrom. The blank forms of reports may be modified and changed from time to time by the National Harrow Company and the blank reports shall be furnished to all licensees, by the corporation; and the said —— —— shall at such time as the trustees
53 shall require, account to and pay to the National Harrow Company at least once in each year, one dollar on each and every harrow and harrow frame without teeth sold, and for the purpose of this agency and license, a sale shall be considered as made when the goods are shipped to the customer, or entered in the books of the agent, as charged to the customer. No agent or licensee shall ship to any person, firm or corporation any float spring tooth harrows or parts thereof to be sold on commission, or allow any rebates or deductions of any character from the price or prices fixed by the National Harrow Company except to settle with an insolvent debtor for harrows previously sold and delivered, or when the agent or licensee has well-founded belief that the customer is insolvent.

Third. The said —— —— hereby agrees in accepting this agency and license, that — will pay, or cause to be paid, at least once in each year, one dollar on each and every harrow and harrow frame without teeth manufactured and sold during this agency, to be paid to the National Harrow Company, which payment shall become due and payable at such time or times in each year as the trustee may fix. The time when said reports shall begin shall be determined by the National Harrow Company, and notice thereof be given to all the agents and licensees.

Fourth. The said —— —— shall not sell float spring tooth harrows, manufactured under this agency and license at a less price, nor on more favorable terms of payment and delivery than shall be fixed by the said National Harrow Company from time to time, and that — will faithfully sell and deliver harrows in accordance with schedule of prices furnished from time to time by the National Harrow Company, which price or prices are and will remain subject to change, as hereinafter provided, providing
54 always that when prices are fixed, they shall not be changed without the consent in writing of four-fifths of all of the licensees of the National Harrow Company. Each licensee shall be entitled to one vote, either in person or by proxy in fixing or changing prices. A schedule of prices now fixed, is attached to and made a part of this agency and license. Changes in prices, when made, are to be filed with the treasurer who shall furnish each agent and licensee with a copy of the price-list and terms of sale, by mail, and the said —— —— agree that — will not thereafter sell and deliver harrows on more favorable terms than the list rate so furnished, but will faithfully observe the requirements of said list prices until notice of a change is received, and that after the receipt of said

notice of change — will thereafter comply with the same as changed, and that — will not, after such changes and notice thereof, to — sell or deliver harrows below, or on more favorable terms than the prices so made. The changes in price shall be uniform with all agents and licensees.

Fifth. This agency and license shall not be transfer-ed, except accompanied with a transfer of stock in the National Harrow Company held by the said —— —— but any such transfer shall not give to the transferee any other or different rights than those held, owned and enjoyed by —.

Sixth. The National Harrow Company, will furnish on request to each agent and licensee, stencils or labels in lots of not less than one hundred, on such nominal terms of sale as the trustees may fix, and one of said labels shall be pasted or affixed upon each and every of said harrows delivered for shipment, in a conspicuous place on each harrow, or on some attachment that goes with said harrow, and a shipment of a harrow without such label may. if willful, at the option of the National Harrow Company, be deemed and
55 treated as a breach of this agency and license. The amount paid for such labels shall be credited and allowed on the amount due to the corporation, at the end of each annual settlement with the corporation.

Seventh. Any violation or departure from any of the terms of this license by the said —— —— shall terminate the same at the option of the National Harrow Company, which option, if exercised, shall be evidenced by the service of a written notice upon the said —— —— by mail, and a cancellation of the agency and license by the corporation as provided to be done, in case of a violation of any of its terms shall also forfeit the stock, and the trustee may also cancel the same, and from and after the service of such notice and cancellation of said stock, all rights under this agency and license shall cease and determine, but such determination and cancellation, by the service of notice, shall not absolve the said —— —— from — obligations to report and pay for all harrows manufactured and sold by — up to the date of such determination, at the rate of one dollar on each harrow sold prior to the service of said notice of cancellation. Nothing herein contained shall give to the board of trustees or to the corporation, the right to abridge or terminate the rights of the second party, without giving — a fair and full opportunity to be heard in regard thereto, and in addition to the remedies herein provided, in case of violation of any of the terms agreed to be performed by the second party, upon any breach of any condition herein, at the option of the National Harrow Company, it may apply for and obtain an injunction restraining a further breach of any condition contained in this agency and license.

Eighth. The National Harrow Company reserves to itself the right to manufacture or furnish at uniform prices to all of its
56 agents and licensees, other styles of harrows than those licensed to their agents and licensees, and to fix the prices and terms of sale at which they are to be sold by the agents and

licensees, which prices, terms and conditions shall be uniform to all, and shall be faithfully observed and kept by —.

Ninth. The board of trustees may consent to any structural changes in the harrows of any agent and licensee, intended to improve the harrows which — are licensed to manufacture and sell, providing the same does not interfere with the rights of any other licensees, and in case it does not, it shall be the duty of the trustees to assent to such changes.

Tenth. The National Harrow Company agree to defend against any suit for an alleged infringement on account of any harrow manufactured and sold by the second party under this license and agency and to pay any costs and damages recovered, arising after the granting of this license and agency providing it is notified of the suit and allowed to appear and conduct the defense.

Eleventh. Nothing contained herein shall be construed to include the harrows licensed, sold and shipped for export to a foreign country; no restriction shall be placed upon such harrows.

Witness the signature of the National Harrow Company and the official seal of the corporation, affixed thereto by direction of the board of trustees, this — day of December, 1890.

THE NATIONAL HARROW COMPANY,
By —— ——, *President.*

Ex. Com.

Schedule of Harrows Licensed.

57 Harrows duplicates of which you are authorized to manufacture, sell, use and vend to others to be used, but always under all of the terms of the foregoing agency and license.

1. A float spring tooth harrow, marked number —.
2. A float spring tooth harrow, marked number —.
3. A float spring tooth harrow, marked number —.
4. A float spring tooth harrow, marked number —.

The following are the prices and terms of sale fixed by the National Harrow Company for the year 1890, and these prices and terms of sale will continue until changed by the consent in writing of the agents and licensees under subdivision four of the foregoing terms of agency and license.

Prices and terms fixed by the National Harrow Company this 10th day of September, 1890, are as follows:

List Prices.

14-tooth steel frame and wood frame plated harrows	$23 00
16-tooth wood frame plain	21 00
16-tooth steel frame and wood frame plated	23 00
18-tooth wood frame plain	23 00
18-tooth steel frame and wood frame plated	25 00
20-tooth wood frame plain	25 00
20-tooth steel frame and wood frame plated	27 50
22-tooth steel frame and wood frame plated	28 50
24-tooth wood frame plain	30 00
24-tooth steel frame and wood frame plated	32 00

For harrow frames complete, less teeth as follows:

14-tooth frame	$14 00
16-tooth frame	14 00
18-tooth frame	16 00
20-tooth frame	18 00
22-tooth frame	20 00
24-tooth frame	20 00

Intermediate sizes of harrows or frames shall be sold at the price of the next highest size.

Single tooth	75

58 A maximum discount of forty-two (42) per cent. may be allowed on sales of harrows, frames and teeth in the following territory:

All of the New England States, also States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia.

A maximum discount of forty-five (45) per cent. may be allowed on all sales made in the territory throughout the United States not mentioned above.

Freight may be allowed to nearest railroad stations or steamboat landing.

Terms on sales made prior to June 1st, four months from June 1st less ten (10) per cent. discount for cash June 10th.

Terms of sales made after June 1st, four months from September 1st, less ten (10) per cent. discount, for cash September 10th.

Agents and licensees may sell harrows at retail to the local users of harrows at their respective places of business only, but not less than the net schedule prices named to the dealers.

Supreme Court, Oneida County.

NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

For an amended answer to the amended complaint of the plaintiff herein defendant pleads as follows:

At the end of the tenth count of the original answer add "defendant denies all that part of said amended complaint designated as 'sixth.' Also all that part of said amended complaint designated as 'eight.' Also all that part of said amended complaint
59 under the 'ninth' clause designated as (*h*). Also every allegation in said amended complaint in the subdivision designated as 'eleventh' and 'twelfth.'"

Defendant further amending said answer pleads as follows: Strike out all of the "eleventh" count of the original answer down to and including the words "right to do" in the twenty-third, folio, and insert in place thereof the following:

Eleventh. Said defendant further answering the said complaint alleges on information and belief that some time in the year, 1890, or early in 1891, a number of persons, corporations and copartnerships who manufactured and sold all or substantially all, the spring tooth harrows manufactured or sold in the United States, entered into agreements, copies of which, except as to the name of the particular party who contracted with the National Harrow Company, are hereunto attached and marked respectively, Exhibits 1, 2 and 3, No. 4½, hereunto attached, being a statement of the prices and terms of sale agreed upon by said parties. That said persons, corporations, and copartnerships were as follows:

D. C. & H. C. Reed, Kalamazoo, Michigan; C. H. Childs & Company, Utica, N. Y.; A. W. Stevens & Company, Auburn, N. Y.; Taylor & Henry, Kalamazoo, Michigan; W. S. Lawrence, Kalamazoo, Michigan; Eureka Mower Company, a corporation organized under the laws of the State of New York, Utica, N. Y.; Hench & Dromgold, York, Penn.; George Sweet & Company, Dansville, N. Y.; D. B. Smith & Company, Utica, N. Y.; L. C. Lull & Company, Kalamazoo, Michigan; the Walker Manufacturing Company, a corporation organized under the laws of the State of New York, Moravia, N. Y.; the Farmers' Friend Manufacturing Company, a corporation organized under the laws of the State of Ohio, Dayton, Ohio; Herndeen Manufacturing Company, a corporation or-
60 ganized under the laws of the State of New York, Geneva, N. Y.; the Williams Manufacturing Company, a corporation organized under the laws of the State of Michigan, Kalamazoo, Michigan; D. O. Everest & Company, Pine Grove, Michigan; Childs & Jones, Utica, N. Y.; the McSherry Manufacturing Company, a corporation organized under the laws of the State of Ohio, Dayton, Ohio; the Clipper Chilled Plow Company, Elmira, N. Y.; E. Bement & Sons, a corporation organized under the laws of the State of Michigan, Lansing, Michigan.

That said Clipper Chilled Plow Company of Elmira, N. Y., was a copartnership consisting of William Strait and others, and that said copartnership signed said agreements, and such agreements were left in the possession of Edwin H. Risley, of Utica, N. Y., or William H. Howard, of Kalamazoo, Michigan, to be delivered, each respectively to the National Harrow Company and a duplicate thereof to each party who entered into the agreement with said National Harrow Company.

That said Clipper Chilled Plow Company entered into an agreement with said Risley to leave said papers signed by it in his possession under the agreement hereto attached and marked Exhibit 4.

The defendant further alleges that about the time said Exhibits 1, 2, 3 and 4½, were executed or agree- upon it was agreed between the parties executing the same, that a corporation should be formed known as the National Harrow Company of Utica, N. Y., and that paid-up capital stock of said company should be issued to all of the parties who should sign the agreements, Exhibits 1, 2, 3 and 4½, or assent thereto, and assign their patents pending applications for patents and the good will of the business of the respective parties

who entered into such agreements to the said National Harrow Company.

61 That such corporation known as the National Harrow Company of Utica, N. Y., was formed among said parties, and that thereafter said corporation did issue its paid-up capital stock to the parties aforesaid in payment for patents, applications for patents and rights thereunder, which each of said parties transferred to said National Harrow Company of New York. That said stock was issued in payment for the property and rights aforesaid to said parties respectively after the award of the arbitrators, mentioned in Exhibit 6, attached hereto, or in some instances to an individual, the share which was awarded to such of said parties as were corporations, except in the case of the said Clipper Chilled Plow Company.

That said National Harrow Company of Utica, N. Y., is the predecessor of the plaintiff herein, as to all rights of every name and nature in said license contracts mentioned in the complaint herein, and under most of the patents now owned by plaintiff, if plaintiff has any right in the same, and which are described in said contracts mentioned in the complaint herein. That immediately after the signing of said agreements known as Exhibits 1, 2, 3, 4 and 4½, said Clipper Chilled Plow Company brought an action in the supreme court of the State of New York, in the county of Chemung, against said National Harrow Company and others to prevent the said papers being delivered to said National Harrow Company, and for the cancellation of the same upon the ground that the same were void as being in restraint of trade and against public policy; that said action was tried at a special term of said court before Hon. Walter Lloyd Smith, one of the justices of said court, about January, 1892, and that said court decided that the agreements were void upon the ground aforesaid, and that the same constituted an illegal combination and ordered the same delivered up to said Clipper Chilled Plow Company for cancellation.

62 Defendant further alleges that thereafter all of said parties, with the exception of said Clipper Chilled Plow Company and E. Bement & Sons, entered into an agreement that all said agreements known as Exhibits 1, 2, 3 and 4½, should be cancelled as among themselves, and that this agreement, was made on or about the first day of April, 1891. That about the same date, all of said parties except the said Clipper Chilled Plow Company and E. Bement & Sons entered into certain other agreements, copies of which except the name of the particular parties with which the National Harrow Company made the particular agreements are hereto attached and marked Exhibits 5, 6 and 7. Exhibit 7, being the same in form as Exhibits A and B, attached to the complaint herein, and which is alleged in the complaint herein, if any such agreement was ever made, as defendant is informed and verily believes. That said agreements, Exhibits 5, 6 and 7, were intended to take the place of said prior agreements, Exhibits 1, 2, 3 and 4½, and were in reality a continuation of the aforesaid agreements, except as said later agreements, Exhibits 5, 6 and 7, differ in form

from the former. That defendant assented to said arrangement on or about the 17th day of June, 1891, and signed agreements like Exhibits 5, 6 and 7, and about said time the Syracuse Chilled Plow Company and the Pitts agricultural works, both being corporations organized under the laws of the State of New York, executed a similar set of papers to Exhibits 5, 6 and 7, or said corporations assented to said arrangements and joined said other persons, corporations and copartnerships in said undertaking, and that said persons, corporations and copartnerships which then had executed said papers, or assented to such arrangements, constituted substantially all the manufacturers of spring tooth harrows in the United States,

63 except the said Clipper Chilled Plow Company of Elmira, N. Y., which company did not manufacture spring tooth harrows to a large extent.

Said defendant further alleges that such agreements contained in Exhibits 5, 6 and 7, were in reality a continuation of the prior said agreements, Exhibits 1, 2, 3 and 4½, except so far as the latter agreements differed in form from the former, and that upon the execution and delivery of the said agreements, Exhibits 5, 6 and 7, the said National Harrow Company controlled substantially the entire manufacture and sale of spring tooth harrows in the United States.

The defendant further alleges, that all said persons, corporations and copartnerships thereafter received paid-up capital stock of said National Harrow Company of New York or of plaintiff in payment for their patents, applications for patents and rights which were transferred to said National Harrow Company in pursuance of the agreements aforesaid; that said stock was issued to such persons, copartnerships and corporations, or that the portion assigned to each of such corporations was issued to some person in trust for such corporation.

Said defendant further alleges that since the making of the said agreements, Exhibits 5, 6 and 7, the prices of iron and steel, which enter largely into the construction of spring tooth harrows, have fallen in the market and said defendant and other manufacturers of spring tooth harrows, are able to manufacture said harrows at a less cost than at the time said agreements were made, and defendant herein is desirous that purchasers and users of spring tooth harrows should have the benefit of such lower cost of production, but that defendant provided Exhibits 5, 6 and 7, are held to be valid is prevented from giving the benefit of such lower prices to its customers and to the trade generally, but it is obliged, provided said exhibits are valid to sell the harrows manufactured and sold by it at exorbitant prices.

Said defendant further alleges on information and belief

64 that said Exhibits 1, 2, 3 and 4½, and also Exhibits 5, 6 and 7, are void and of no effect, for the reason that the same are against public policy and in restraint of trade, and for the reason that many of the parties to the same are corporations, and the said agreements are *ultra vires* and void, and also for the reason that said defendant is a corporation organized under the laws of the State of Michigan, and that a statute of the State of Michigan, for-

bids the making of any contracts, agreements, undertakings or combinations of any kind. That said statute is known as act No. 225, of the Session Laws of the State of Michigan for the Year 1889, is entitled "An act declaring contracts, agreements, understandings, and combinations unlawful, and to provide punishment for those who shall enter into the same or do any act in performance thereof." Approved July 1, 1889.

That said Exhibits 1, 2, 3 and 4½, and also Exhibits 5, 6 and 7, are in violation of and to that end defendant, expressly plead-, the act of Congress of the United States approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress entitled "An act to protect trade and commerce against unlawful restraints and monop-lies."

For further answer to said complaint defendant on information and belief alleges that plaintiff herein was organized about the 17th day of August, 1891, under the laws of the State of New Jersey, entitled "An act concerning corporations," approved April 7, 1873, and amendments thereof and additions thereto.

That the ostensible purpose for which said plaintiff was organized was "making purchasing and selling manufactured articles, and also of acquiring and disposing of rights to make and use the same" and for no other purpose; but that said plaintiff has never made, pur-
65 chased, sold or manufactured any article of any name or nature, but that the sole business of said plaintiff has been the acquiring of patent rights and interests therein, and enforcing the same or attempting so to do, and therefore defendant alleges on information and belief, that the real object of said corporation was to form a trust and combination for the sole purpose of monopolizing the manufacture and trade in spring tooth harrows in the United States, and that said Exhibits 1, 2, 3, 4½, 5, 6 and 7, in effect did form a trust and combination, and that said National Harrow Company, plaintiff herein is the result thereof, and that it was in reality formed for the sole purpose of effecting the absolute control of the manufacture and sale of spring tooth harrows in the United States, and that said company has in fact substantially accomplished its object, which defendant alleges upon information and belief, is unlawful upon the ground that it is against public policy, and in restrain- of trade.

Defendant further amends said answer by inserting before the words "further" in the twenty-third folio of the original answer the word "defendant," and after the same word the word "alleges," and then strike out all of the "eleventh" count of said original answer beginning with the word "defendant" in the twenty-eighth folio down to the end of said "eleventh" count.

EXHIBIT 1.

Memorandum of contract between the National Harrow Company of the first part and sundry persons, firms and corporations, party of the second part as follows:

Whereas, the National Harrow Company, a corporation has been organized for conducting throughout the United States, the float

spring tooth harrow business, through its agents and licensees; and whereas, the undersigned were, in the season of 1890, and are
66 now engaged in manufacturing and marketing float spring tooth harrows, and are each the owners of patents relating thereto, and are each desirous of transferring their business and patents relating to float spring tooth harrows to the National Harrow Company, and agree not to be directly or indirectly interested in the manufacture or sale of float spring tooth harrows, or allow them to be manufactured or sold in any building, controlled by them or either of them thereafter in the United States, or any Territory thereof, except Montana, and except as agents and licensees of the National Harrow Company, and to receive in payment therefor paid-up stock of the said corporation, for the value of the business, good will patents, etc., and to accept uniform licenses containing uniform provisions, by which they are to receive a license from said corporation, under all patents which it may own, to manufacture and sell the same kind of float spring tooth harrows, which each of said firms are now manufacturing and marketing as agents and licensees of the National Harrow Company. Now, therefore, in consideration of one dollar, each to the other paid, and the mutual advantages and benefits to be derived therefrom, it is agreed as follows:

First. The National Harrow Company agrees to purchase the business, good will of the business, all patents now owned or which may hereafter be owned, all licenses and rights under patents relating to the manufacture and sale of float spring tooth harrows in the United States; providing, always, that each of said persons, firms and corporations who hereafter sign this agreement shall agree in said general assignment of the business, good will of the business, trade-marks, labels, designs, patents and pending applications for patents relating to float spring tooth harrows that the parties will not for the period of fifty years be engaged in the manufacture or sale
67 of float spring tooth harrows in any of the Territories of the United States except Montana, except as agents and licensees of the National Harrow Company and the National Harrow Company agree to issue paid-up stock of the corporation for the value so transferred to be agreed upon or settled by arbitration.

Second. The National Harrow Company upon the execution and delivery of said transfer by the persons, firms and corporations, parties hereto, shall, as soon thereafter as the papers can be executed, appoint as agents and licensees each of the persons, firms and corporations, parties hereto, the rights as agents and licensees of the National Harrow Company to use and employ all of the trade-marks, labels, designs, etc., theretofore used by each firm respectively, but now owned by the National Harrow Company which were transferred to it by the person, firm or corporation who transferred the same, authorizing the same person, the same firm and the same corporation to build and market the same style and construction of float spring tooth harrows which the person, firm or corporation was engaged in building and marketing just prior to the sale by him, they, or it to the National Harrow Company and upon condition that such person, firm or corporation shall pay at uniform times with all other

agents, to the National Harrow Company one dollar on account of each and every float spring tooth harrow sold and delivered after September 1st, 1890, and to comply with all of the requirements or the board of directors of the National Harrow Company with reffe-ence thereto which requirements shall be uniform with all other agents and licensees it being understood that each person, firm or corporation who transfer their business and their property relating to float spring tooth harrows to the National Harrow Company shall be entitled to receive and enjoy the same terms of agency and li-
cense, subject to the same terms and conditions as every other
68 agent and licensee of the National Harrow Company except in the particular style of harrows, which each person, firm or corporation is entitled to manufacture and sell under the terms of said uniform license; and each license to each agent of the National Harrow Company shall be exclusive, and the National Harrow Company shall not manufacture and sell, and no agent and licensee shall be licensed or authorized to build the same style and construction of harrows that another agent and licensee is authorized to manufacture, unless they were manufacturing such harrows just prior to their assignment to the National Harrow Company the intent being that each person, firm and corporation who are appointed agents and licensees of the National Harrow Company shall be licensed to manufacture the same harrows, that they were manufacturing just prior to their respective assignments to the corporation, and such other harrows as the National Harrow Company may specifically designate by its agency and license to build to any specific territory; but such agency license and territory shall be uniform to all.

Third. In case it shall at any time be deemed to the mutual advantage of the agents and licensees of the National Harrow Company to dissolve the corporation and nine directors shall so vote by resolution, then and in that event, the corporation shall cancel all existing agencies and licenses, and shall execute and deliver to each person, firm or corporation, a retransfer of all the interests which were transferred to the National Harrow Company by the person, firm or corporation to whom the retransfer is made, and the corporation shall then be wound up and each stockholder shall surrender his stock, and execute and deliver a release of all claims against the corporation; and any sum of money, that may remain after the payment of debts of the corporation, shall be divided among the
stockholders according to the amount of stock which each
69 interest holds *pro rata*, and no acknowledgement of the validity of any patent shall be of any force or effect thereafter; the intent being that each interest shall stand after said dissolution upon the same ground, with reference to their respective interests, as they did prior to the execution of this contract, so far as the same can be carried out.

Fourth. Each person, firm and corporation who sign this agreement agree that they will not contest the validity of any patent owned by the National Harrow Company, either as to novelty or infringement; and that they will not be interested, directly or indi-

rectly in contesting the said patents owned by the National Harrow Company during the existence of said corporation.

Fifth. It is mutually agreed by the National Harrow Company party of the first part, and the persons, firms or corporations signing this agreement, parties of the second part, that in case of any difference arising with reference to the value of the business, good will of the patents, etc., of either or all of the parties constituting the party of the second part and the National Harrow Company, or any other differences relating thereto, all of such differences shall be adjusted by arbitration. The National Harrow Company shall select one arbitrator, and the persons, firm or corporation constituting the party of the second part shall choose one arbitrator, treating all interests as one; and the two arbitrators shall hear the statements and allegations of the National Harrow Company and of the respective persons, firms and corporations forming the party of the second part, whose interests in the distribution of the capital stock of said corporation shall be treated in the aggregate, leaving the respective parties to adjust the proportion of stock between themselves; and, should the two arbitrators thus chosen, after hearing the statements and allegations of the parties fail to agree, they shall then and in that event choose a disinterested umpire, in no way connected with the business interests of either party, and the two arbitrators first chosen shall then submit their differences, with their statements and allegation to the umpire; and the decision of any two of the three arbitrators shall be binding and the award shall be made accordingly, and shall be carried into effect, and the National Harrow Company shall be at liberty to deliver the certificates of the paid-up capital stock of the corporation to the arbitrator chosen by the parties forming the party of the second part, to be received by him in full payment of all interests transferred, and held by him in full payment for the interests transferred to the National Harrow Company, and the arbitration shall be a condition precedent to any right of action to recover said stock of the National Harrow Company.

Sixth. The parties signing this agreement are each, upon request to execute and deliver a general assignment of their business, good will and patents containing an agreement not to be interested in the float spring tooth harrow business for the period of fifty years, and also formal assignments of patents and pending applications for patents for record in the Patent Office.

Seventh. This contract shall be deemed a continuing one and shall apply to and bind the parties, the heirs, representatives, successors and assigns during the existence of the said National Harrow Company.

November 10, 1890.

THE NATIONAL HARROW CO., [L. S.]
By CHAS. H. CHILDS, *Pres't.* [L. S.]

EXHIBIT 2.

Whereas the —— —— a copartnership doing business at —— in the State of —— is engaged in the manufacture and sale of float spring tooth harrows and said firm is composed of —— —— and are the
71 owners of, or have an interest in, several patents of the United States, relating to float spring tooth harrows, and under some one or all of said several patents it is now manufacturing and marketing float spring tooth harrows; and whereas, the National Harrow Company, a corporation duly organized under the laws of the State of New York, is desirous of acquiring the entire right, title and interest in and to all patents owned or held, or in which the —— —— or any officers or trustees of said corporation, may have or hold an interest and in and to all patents now pending in the Patent Office, and all that it may hereafter obtain or be interested in, legally capable of being assigned, relating to float spring tooth harrows, and also to acquire the good will of the said copartnership and of members, officers and directors in the manufacture and sale of float spring tooth harrows, and all rights of trade-marks, labels or other designs used and employed in said business of float spring tooth harrows or in any way relating to said float spring tooth harrow business as fully and as completely as the same can be sold and assigned to the said National Harrow Company together with all rights and privileges connected therewith: Now, therefore, in consideration of the premises and one dollar each to the other paid, the receipt whereof is hereby acknowledged, and of the mutual benefits to be derived from the faithful performance of all the stipulations and conditions herein expressed, it is agreed as follows: The —— —— party of the first part in consideration of the premises before mentioned, and of the sum of one dollar paid by the National Harrow Company, party of the second part, the receipt whereof is hereby acknowledged, each to the other, and the agreement to issue and deliver paid-up stock of the National Harrow Company for the value of the patents and pending applications, business and good will of the business to hereafter be agreed upon or fixed
72 by arbitration, and when agreed upon or fixed by arbitration the said stock is then to be issued and delivered to the ——
——.

The party of the first part hereby sells, assigns, transfers and sets over to the National Harrow Company, party of the second part, its successors and assigns all their right, title and interest in and to all patents relating to float spring tooth harrows, issued and pending, in which it or any of its officers or trustees may now or hereafter have an interest; and it agrees that it will execute separate formal assignments thereof, upon request for the purpose of record; and the —— —— hereby assigns the good will of its float spring tooth harrow business, trade-marks, and the right to continue the further manufacture and sale of float spring tooth harrows, except as agents and licensees of the National Harrow Company to the said National Harrow Company and to its successors and assigns, to have and to

hold the same forever. The party of the first part hereby agrees to receive in payment for said sale and transfer paid-up stock of the said National Harrow Company to the amount at the par value of the stock hereinafter agreed upon to be received or fixed by arbitration. In consideration of the purchase by the said National Harrow Company of the said patents and good will of the businsss of the said —— —— manufacturers and dealers in float spring tooth harrows, and of the payment of the price stipulated to be paid the said —— —— agrees that it will not at any time or times within the period of fifty years, directly or indirectly engage in the manufacture or sale, or to be interested directly or indirectly in any manner, form or shape whatsoever, in the manufacture and sale of float spring tooth harrows, or allow the same to be manufactured in any building controlled by it (except in the capacity of agent and licensee of the National Harrow Company) within any of the
73 several States of the United States of America, excepting Montana, or within any of the Territories thereof, or within the District of Columbia, or be directly or indirectly interested in importing for the purpose of marketing in the Territories aforesaid, any float spring tooth harrows, within the period and territory aforesaid, and any manufactory carried on in the State which is excepted from this transfer, if there be any, shall not authorize or sanction the use or sale of float spring tooth harrows outside of the State of Montana for the period aforesaid; and for value received it agrees that it will not contest the validity of any patents owned, or that may be owned by the National Harrow Company, as to novelty or infringement or encourage others so to do. This obligation shall apply to and bind the respective parties their successors and assigns; and the officers of said copartnership. Witness our hands and seals this 10th day of November, 1890.

—— ——.
—— ——.

In the presence of
—— ——.

"In consideration of the sum of one dollar to us in hand paid, the receipt whereof is hereby confessed, the —— —— in the State of New York, agrees to, and with the National Harrow Company, that the said —— —— will perform all of the obligations and stipulations contained in the annexed contract to be performed by it, and in default of its performing the same, within the language and spirit thereof, it acknowledges itself to be justly indebted to the National Harrow Company for and on account of all damages growing out of said breach or breaches, if any there be, and in addition thereto, the further sum of ten thousand dollars ($10,000) fixed and liquidated damages to the National Harrow Company, its successors and assigns, for which payment well and truly to be made it binds itself, its
74 successors and assigns jointly and severally firmly by these presents; and it consents that any breach or breaches of said obligation on the part of the —— —— or its officers, obligee may

be restrained by injunction and waive thereby the right of trial by jury.

"Sealed with our seals and dated this 10th day of November, 1890.

—— ——.
—— ——.

"In presence of
—— ——."

EXHIBIT 3.

"Memorandum of agreement, made this 2d day of October, 1890, between the —— —— of the first part and the National Harrow Company of the second part as follows:

"Whereas the party of the first part has this day entered into a contract with the National Harrow Company for the transfer to the National Harrow Company of their float spring tooth harrow business, patents, pending applications for patents, rights and privileges under patents relating to float spring tooth harrow business including trade-marks, labels, designs, connected with said business and pertaining thereto, and have agreed to accept in payment for the interest transferred paid-up stock of the National Harrow Company in an amount to be hereafter agreed upon by the parties, or, in case of their inability to agree, then to be fixed by arbitration as provided: Now, therefore, in consideration of one dollar each to the other paid, the receipt whereof is hereby acknowledged, and of the mutual benefits to be derived, it is agreed as follows:

"First. That in case the parties hereto are unable to agree between themselves upon the value of the property transferred and of the amount of capital stock to be issued in payment therefor, then, and in that event, all such differences are to be settled by arbitration.

75 "Second. The party of the first part hereby appoints —— —— as its arbitrator, to represent its interests; and the party of the second part hereby names and appoints Edwin H. Risley of Utica, N. Y., as arbitrator to represent its interests in said arbitration. The two arbitrators thus selected shall look over the whole matter, and agree upon the amount of capital stock to be issued in payment for the interests transferred to the National Harrow Company and hear such allegations and statements relating thereto which either party may desire to make, and they shall then proceed to fix and determine the amount of capital stock which shall be issued to the party of the first part by the National Harrow Company in payment for the interest transferred; and, in case they are unable to agree upon the amount to be paid, then, and in that event, they shall choose a disinterested arbitrator, in no way connected with any of the agents and licensees of the National Harrow Company or with either of the parties, and they shall then submit their respective views to said third arbitrator, and the points in dispute, and the decision of any two of said arbitrators shall be binding upon all of the parties, and their award in writing shall be made, and the National Harrow Company shall issue paid-up stock to the amount

fixed and determined by the arbitrators thus chosen. This arbitration if it shall go into effect, shall be taken up and the matter disposed of in connection with the other arbitrators, and the value be fixed with reference to the interest of the other agents and licensees who may transfer their business, etc., to the National Harrow Company to the end that an equitable division may be reached, reference being had to all the interests involved in the corporation; and the award shall be made within ten days after the final submission of the matter to the arbitrators, should arbitrators be found necessary. The party of the first part shall not maintain an action against the corporation of the National Harrow Company to
76 fix the value of said stock, unless the corporation of the National Harrow Company shall refuse or neglect to proceed to the arbitration or refuse to carry out the same in a reasonable time; and the arbitration shall be completed prior to September 1st, 1891.

"Witness our hands and seal- this 10th day of November, 1890.

THE NATIONAL HARROW COMPANY, [L. S.]
By CHAS. H. CHILDS, *President.* [L. S.]"

EXHIBIT 4.

UTICA, N. Y., *Nov.* 17, 1890.

Clipper Chilled Plow Company, Elmira, N. Y.

GENTS: This will acknowledge that you have delivered into my possession three documents, executed in duplicate relating to your firm going into the National Harrow Company and two sections of float spring tooth harrows, which it is desired that the National Harrow Company license you to manufacture under the agreements signed by your firm and the license of the company, which if the National Harrow Company granted to your company the right to manufacture and market duplicates of the two samples, then the papers held by me shall be delivered to the treasurer of the National Harrow Company and they shall be binding; and, should the directors agree to license the wood frame and not the steel frame harrow, then the papers upon request, are to be delivered up to you for cancellation, and are not to be operative unless you elect to make them *go*. In the meantime your firm are to sell your harrows at the schedule prices fixed by the National Harrow Company, a price-list being furnished your company, and your company is expected to cancel all orders for harrows where the prices are below schedule rates, where the number of harrows are not fixed in the order, where the same were taken subsequent to September 10, 1890,
77 unless the parties giving the open orders will consent to take the harrows on the open orders at the schedule price, or above such prices, and all orders now taken, where the prices are more favorable than those fixed by the company, are to be filled at the prices at which orders were taken, but no future orders are to be taken on more favorable terms than those fixed by the company, until after the meeting of the executive committee to pass upon the

steel frame harrow, and determine whether or not the same shall be licensed. I am to hold the papers under the foregoing conditions.

Yours truly, EDWIN H. RISLEY.

EXHIBIT 4½.

Prices and terms fixed by the National Harrow Company, this 10th day of September, 1890, are as follows:

14-tooth steel frame and wood frame plated harrows	$23 00
16-tooth wood frame plain	21 00
16-tooth steel frame and wood frame plated	23 00
18-tooth wood frame plain	23 00
18-tooth steel frame and wood frame plated	25 00
20-tooth wood frame plain	25 00
20-tooth steel frame and wood frame plated	27 00
22-tooth steel frame and wood frame plated	28 00
24-tooth wood frame plain	30 00
24-tooth steel frame and wood frame plated	32 00

For harrow frames complete, less teeth as follows:

14-tooth frame	$14 00
16-tooth frame	14 00
18-tooth frame	16 00
20-tooth frame	18 00
22-tooth frame	20 00
24-tooth frame	20 00

78 Intermediate sizes of harrow or frames shall be sold at the price of the next highest size.

Single tooth	75

A maximum discount of forty-two (42) per cent. may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England States; also States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia.

A maximum discount of forty-five (45) per cent. may be allowed on all sales made in the territory throughout the United States not mentioned above.

Freight may be allowed to nearest railroad station or steamboat landing.

Terms on sales made prior to June 1st, four months from June 1st, less ten (10) per cent. discount for cash June 10th.

Terms of sales made after June 1st, four months from September 1st, less ten (10) per cent. discount for cash September 10th.

Agents and licensees may sell harrows at retail to the local users of harrows at their respective places of business only, but not less than the net schedule prices named to the dealers.

EXHIBIT 5.

Escrow Agreement.

This memoranda of agreement, made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a corporation of Utica, in the State of New York, and Edward Norris of the same place; and E. Bement & Sons of Lansing, in the State of Michigan,

Whereas, the said National Harrow Company is the owner of a large number of letters patent relating to float spring tooth
79 harrows, and is desirous of granting*ing* licenses thereunder to the following-named persons, firms and corporations, to wit: Chas. H. Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndeen Manufacturing Company, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everest & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate a certain contract and license for each of said persons, firms and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms and corporations to be signed and executed by said respective persons, firms and corporations.

Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris, whereupon they shall become operative and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same; in person or by mail.

But in case any of the above-named persons, firms and corporations shall neglect or refuse to sign, execute and deliver said
80 respective contracts and licenses, on or before the first day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative and in case *of* the said National Harrow Company shall conclude not to accept any less number than the

whole of such respective contracts, and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

Witness the signature of the parties.

THE NATIONAL HARROW CO.,
By CHAS. H. CHILDS, *Pres't.*
EDWARD NORRIS.
E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

Dated this 1st day of April, 1891.

EDWARD NORRIS.

(Indorsed:) Ex. G. I. Escrow agreement. The National Harrow Company, Edward Norris and E. Bement & Sons, Lansing, Mich. Dated at Utica, N. Y., April 1, 1891.

EXHIBIT 6.

This agreement made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a cor-
81 poration organized under and by virtue of the laws of the State of New York, of the first part and —— —— of Lansing, in the State of Michigan, of the second part.

Witnesseth. The said second party hereby ratifies and confirms the assignment, sale and transfer of each and every patent and pending applications for patents heretofore made and executed by said second party to said first party, and the said second party for a valuable consideration to it in hand paid by said first party, hereby sells, assigns, transfers and sets over each and every such patent and pending application for patents and all said second party's rights, interests and title therein and thereunder to said first party, its successors and assigns, and declares said first party to be the sole and absolute owner thereof, free and clear from any and all claims, agreements and covenants in relation thereto.

The said first party for a valuable consideration to it in hand paid by said second party, hereby sells, assigns transfers and reconveys to said second party, its successors and assigns all interests and property heretofore transferred to it by said second party including the good will of the float spring tooth harrow business of said second party, and all contracts and agreements, instruments, covenants and promises heretofore executed, transferred and set over by said second party to said first party, except as it is hereby expressly understood and agreed that the assignments of, and all rights in, to and under said patents, so conveyed by said second party to said first party are hereby confirmed in said first party, but all other obligations, rights and interests as between the parties hereto are

hereby cancelled and declared to be of no force and effect, and each party hereto releases and discharges the other from any and all claims for damages thereunder.

82 And it is hereby mutually covenanted and agreed by and between the parties hereto, that the value of each and every patent, and the rights thereunder so conveyed as aforesaid by said second party to said first party, and hereby confirmed in and to said first party shall be submitted to, determined and fixed by Henry J. Cookinham of Utica, in the State of New York, and William G. Howard of Kalamazoo, in the State of Michigan, as arbitrators of the same, and all questions are hereby submitted to said arbitrators, and it is further understood and agreed that in case said arbitrators shall be unable to agree upon the value of such patents and rights thereunder, as aforesaid, then and in such case, the said Henry J. Cookinham and William G. Howard shall select a competent disinterested third party to become one of their number as an arbitrator to determine and settle the said questions hereby submitted to them, and they shall submit their differences to said third arbitrator, and an agreement of all or any two of said arbitrators upon the said questions hereby submitted to them shall be final an conclusive upon the parties hereto, and shall be rendered in duplicate in writing on or before July 1, 1891, to each of the parties hereto, and said arbitration may be brought on for hearing on ten days' previous notice in writing by mail to the parties in interest.

Said first party hereby agrees to and with said second party to issue to it, its successors or assigns, the paid-up capital stock of the said National Harrow Company to an amount equal to the value of such patents, and all rights thereunder so assigned as aforesaid by said second party to said first party as found, fixed and determined by said abitrators, within thirty days after such value shall have been ascertained and reported as herein provided for, and no suit or action against the National Harrow Company to fix or recover the value of such patents and rights thereunder, shall be instituted in any court of law or equity unless the National Harrow Com-

83 pany shall neglect or refuse to issue its stock as herein provided, to E. Bement & Sons for the value of said patents and rights thereunder as aforesaid.

This agreement and each of the covenants herein contained is made in consideration of one dollar paid by each to the other, the receipt of which is hereby acknowledged and for value received by each from the other, and the covenants herein contained to be performed by the other, and shall apply to and bind the parties hereto, their successors and assigns.

In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written.

THE NATIONAL HARROW COMPANY,
By CHAS. H. CHILDS, *President.*
E. BEMENT & SONS,
By A. O. BEMENT, *President.*

Exhibit 7.

License Contract.

Whereas, certain letters patent of the United States of America were issued to sundry parties and are now owned by the National Harrow Company a corporation organized and doing business at the city of Utica, in the county of Oneida, and State of New York, for new and useful improvements relating to float spring tooth harrows, float spring tooth harrow frames, and attachments applicable thereto, and are numbered and dated as follows to wit:

150,976, May 19, 1874.	197,515, Nov. 27, 1877.
197,703, Nov. 27, 1877.	201,946, April 2, 1878.
205,449, June 25, 1878.	224,273, Feb. 10, 1880.
224,274, Feb. 10, 1880.	224,275, Feb. 10, 1880.
227,683, May 18, 1880.	232,192, Sept. 14, 1880.
233,718, Oct. 26, 1880.	235,071, Dec. 7, 1880.
239,947, April 12, 1881.	241,528, May 17, 1881.
84 244,100, July 12, 1881.	245,033, Aug. 2, 1881.
245,718, Aug. 16, 1881.	250,065, Nov. 29, 1881.
251,208, Dec. 20, 1881.	262,918, Aug. 22, 1882.
264,360, Sept. 12, 1882.	272,939, Feb. 27, 1883.
271,938, Feb. 6, 1883.	266,348, Oct. 24, 1882.
284,278, Sept. 4, 1883.	278,287, May 22, 1883.
309,416, Dec. 16, 1884.	301,375, July 1, 1884.
327,340, Sept. 29, 1885.	309,800, Dec. 23, 1884.
348,544, Sept. 7, 1886.	337,951, March 16, 1886.
359,539, March 15, 1887.	358,839, March 8, 1887.
359,970, March 22, 1887.	359,969, March 22, 1887.
361,792, April 26, 1887.	360,985, April 12, 1887.
367,462, Aug. 2, 1887.	362,626, May 10, 1887.
371,902, Oct. 18, 1887.	370,915, Oct. 4, 1887.
374,159, Nov. 29, 1887.	371,903, Oct. 18, 1887.
375,511, Dec. 27, 1887.	375,510, Dec. 27, 1887.
378,081, Feb. 21, 1888.	R. 10893, Jan. 10, 1888.
382,304, May 8, 1888.	379,018, March 6, 1888.
386,094, July 10, 1888.	386,021, July 10, 1888.
390,065, Sept. 25, 1888.	388,306, Aug. 21, 1888.
392,312, Nov. 6, 1888.	392,311, Nov. 6, 1888.
393,156, Nov. 20, 1888.	393,108, Nov. 20, 1888.
396,696, Jan. 22, 1889.	393,344, Nov. 20, 1888.
399,731, March 19, 1889.	396,944, Jan. 29, 1889.
400,397, March 26, 1889.	400,398, March 26, 1889.
401,833, April 23, 1889.	402,079, April 23, 1889.
402,629, May 7, 1889.	403,976, May 28, 1889.
405,459, June 18, 1889.	405,580, June 18, 1889.
413,352, Oct. 22, 1889.	412,428, Oct. 8, 1889.
413,499, Oct. 22, 1889.	413,498, Oct. 22, 1889.
416,995, Dec. 10, 1889.	413,538, Oct. 22, 1889.
419,990, Jan. 21, 1890.	419,971, Jan. 21, 1890.

426,666, April 29, 1890.
428,310, May 20, 1890.
434,110, Aug. 12, 1890.
446,820, Feb. 17, 1891.
421,789, Feb. 18, 1890.
426,695, April 29, 1890.
428,329, May 20, 1890.

85 And whereas —— —— desires to acquire the right to use in — business in the manufacture at —— and sale throughout the United States, of float spring tooth harrows, harrow frames without teeth and attachments applicable thereto, in — name under the aforesaid patents or some one or more of them, and under all other patented rights owned or hereafter acquired by the National Harrow Company, which apply to and embrace the peculiar construction employed by —— —— during the term of such patents or any or either thereof, applicable to and embracing such construction.

Now therefore, know all men by these presents, that the National Harrow Company, licensor, has given and granted under the patents as aforesaid, and by these presents does give and grant under the patents as aforesaid to —— —— the license and privilege of using the rights under the patents as aforesaid in — said business of manufacturing, marketing and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames, without teeth and attachments applicable thereto, a sample of which harrows, harrow frames and attachments which said —— —— is licensed to manufacture and sell, *are* in the possession of the treasurer of the National Harrow Company and marked and numbered as set forth in Schedule "A" made a part hereof. This license is granted upon following terms, viz:

First. —— —— shall pay or cause to be paid to the National Harrow Company on the first day of September, 1891, as royalties the sum of one dollar for each and every float spring tooth harrow or float spring tooth harrow frame without teeth sold by — in pursuance of the strict terms of this license, between the time when this license is delivered and becomes operative and the first day of August, 1891, and shall pay annually thereafter
86 on the first day of September during the continuance of this license, a royalty of one dollar for each and every float spring tooth harrow, or float spring tooth harrow frame without teeth sold by — in pursuance of the strict terms of this license on the first day of September in each year thereafter, on all sales made prior to the first day of August preceding September of the year in which the royalty is payable; all of which royalties and sums provided by this agreement shall be payable at the office of and to the National Harrow Company in the city of Utica, N. Y.

Second. —— —— agrees that between the 1st and 10th of each and every month during the continuance of this license, — will make verified reports to and mail the same to the said National Harrow Company of sales of harrows and harrow frames without teeth, stating the number of harrow- and harrow frames sold during the preceding month; and — further agrees to keep

books in which — shall enter such sales, which books shall be open for inspection of the National Harrow Company, or any duly authorized agent, or attorney thereof, during business hours. The National Harrow Company may take statements or extracts from said books, and for the purpose of this license, a sale shall be considered as made when the harrows or harrow frames without teeth are shipped or delivered to the purchaser.

—— —— agrees that it will not ship float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, to any person, firm or corporation to be sold on commission, or allow any rebate or deduction from the price or prices fixed in this license, except to settle with an insolvent debtor, for harrows, harrow frames or attachments applicable thereto, previously sold or delivered.

Third. —— —— agrees that it will not during the continuance of this license, sell float spring tooth harrows, float spring
87 tooth harrow frames without teeth or attachments applicable thereto, manufactured under this license, or for this licensee by another licensee as herein provided at a less price, or on more favorable terms of payment and delivery to the purchasers, than is set forth in Schedule B, made a part of this license, except as hereinafter provided.

Fourth. The National Harrow Company reserves the right to decrease the selling prices and to make the terms of payment and delivery more favorable to the purchaser, and to reduce the royalty on float spring tooth harrows, float spring tooth harrow frames, without teeth and attachments applicable thereto, manufactured under this license.

Fifth. The National Harrow Company agrees that it will furnish on request to —— —— license labels at the price of ten cents each, in lots of not less than one hundred, and agrees that — will affix one of said labels to each float spring tooth harrow, and to each float spring tooth harrow frame without teeth, before shipping the same from — factory, and the amount paid for such labels by —— —— shall be credited and allowed on the royalty at the time of payment of said royalty.

Sixth. —— —— agrees that it will not, during the continuance of this license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows or float spring tooth harrow frames without teeth or attachments applicable thereto, than those which — is licensed to manufacture and market under the terms of this license, except such as — may manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee shall be licensed by the National Harrow Company to manufacture
88 and sell, except such other style and construction as it may be licensed to manufacture and sell by the National Harrow Company.

Seventh. —— —— agrees to pay to the National Harrow Company for each and every float spring tooth harrow, float spring tooth harrow frame without teeth or attachments applicable thereto,

manufactured or sold by it, contrary to the strict terms and provisions of this license, the sum of five dollars, which is hereby agreed upon and fixed as liquidated damages therefor.

Eighth. —— —— agrees that during the term of this license — will not directly or indirectly in any way, deny or contest the validity of any of the patents applicable to and embracing the construction which — is licensed to manufacture or that — may manufacture for another licensee, which said licensee is licensed to manufacture and sell, or the reissues thereof, or the sufficiency of the specifications thereof or the validity of the title of such letters patent or reissues, or the right of the National Harrow Company to make licenses to others, and no act of either party shall invalidate this admission and said —— —— will not alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, which — is authorized to manufacture and sell under this license, in any part or portions thereof which embody any of said inventions covered by such letters patent, or any of them, or any reissues thereof.

Ninth. It is further hereby covenanted and agreed by the National Harrow Company, to and with —— —— that the National Harrow Company will not, after this license is delivered and become- operative, let, grant or license any other person, firm or corporation, the right to manufacture and sell any float spring tooth harrow, float spring tooth harrow frame without teeth or
89 attachments applicable thereto, of the peculiar style and construction, or embodying the peculiar features thereof, used by — in the float spring tooth harrow, or the float spring tooth harrow frame without teeth and attachments applicable thereto, as illustrated and embodied in the sample harrow now in the possession of the treasurer of the National Harrow Company, and referred to in Schedule A, made a part hereof.

Tenth. Nothing contained in this license shall be construed to authorize or permit —— —— to manufacture or vend, or procure to be manufactured or used, directly or indirectly, any other or different style of float spring tooth harrow, float spring tooth harrow frame without teeth or attachments applicable thereto, than duplicates of such samples as deposited by — with, and in the possession of the treasurer of the National Harrow Company, and embraced in this license, or any part thereof, embraced in or forming a part of such invention described in the patents hereinbefore mentioned, or the reissues of such patents, except such portions thereof, as — may supply to another licensee of the National Harrow Company, which such other licensee shall be licensed to manufacture and sell.

Eleventh. Any departure from the terms of this license by the licensee may, at the option of the National Harrow Company, be deemed and treated as a breach of this license, and the licensee may be treated as an infringer; or the National Harrow Company may restrain the breach thereof in a suit brought in any court of competent jurisdiction, and may apply for and obtain an injunction restraining the further breach thereof, and the licensee waives the

right of trial by jury, which remedy shall be in addition to the liquidated damages hereinbefore provided for.

90 Twelfth. The termination of this license by the National Harrow Company shall not release the licensee from its obligation to pay the royalties and sums hereinbefore provided for harrows and harrow frames without teeth and attachments applicable thereto, manufactured or sold by it up to the time of the termination of this license by said National Harrow Company, which royalties and sums shall thereupon become due and payable immediately.

Thirteenth. The National Harrow Company agrees to defend —— —— in any suit brought for an alleged infringement on account of the manufacture or sale of float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applicable thereto, manufactured or sold under this license which — is licensed to manufacture or sell, and to pay any costs or damages recovered in said suit, provided it is notified of the suit, and allowed to appear and conduct the defense.

Fourteenth. No royalties or liquidated damages shall be paid to the National Harrow Company for float spring tooth harrows, float spring tooth harrow frames, without teeth or attachments applicable thereto, exported for use in a foreign country.

Fifteenth. This license is personal to the licensee and is not assignable by — or by operation of law, except to the successors of —— —— in the same place and business, without the written consent of the licensor, nor shall the royalties or sums hereinbefore specified cease to be paid under any circumstances whatever except under the conditions named in this license, during the continuance thereof. This license applies only to float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto.

Sixteenth. It is agreed by and between the parties hereto, that this license shall continue during the term of the patent or

91 patents applicable to and embracing the constructions licensed hereunder and during the term of any reissues thereof.

Seventeenth. The place of performance of this agreement shall be the city of Utica, N. Y., and this agreement shall be construed and the rights of the parties thereunder determined according to the laws of the State of New York.

Eighteenth. This contract or license, and each of the provisions therein contained, is made in consideration of one dollar paid by each of the parties to the other, the receipt of which is hereby acknowledged and for value received by each from the other, and the covenants therein contained to be performed by the other, and shall apply to and bind the parties thereto, their successors, heirs and assigns.

SCHEDULE "A."

Nineteenth. This schedule embraces harrows, harrow frames without teeth and attachments applicable thereto, duplicates of which the licensee is authorized to manufacture, sell use and vend

to others to be used, but always as licensee under the terms of this license.

1. A float spring tooth harrow, marked number —.
2. A float spring tooth harrow, marked number —.
3. A float spring tooth harrow, marked number —.
4. A float spring tooth harrow, marked number —.

SCHEDULE "B."

Twentieth. Prices and terms of sale under this license:

14-tooth steel frame and wood frame plated harrow	$23 00
16-tooth steel frame and wood frame plated harrow	23 00
18-tooth steel frame and wood frame plated harrow	25 00
20-tooth steel frame and wood frame plated harrow	27 50
22-tooth steel frame and wood frame plated harrow	28 50
24-tooth steel frame and wood frame plated harrow	32 00

92 For harrow frames complete, less teeth, as follows:

14-tooth frame	$14 00
16-tooth frame	14 00
18-tooth frame	16 00
20-tooth frame	18 00
22-tooth frame	20 00
24-tooth frame	20 00

Intermediate sizes of harrows or frames shall be sold at the price of the next larger size.

Single tooth	.75

A maximum discount of forty-two (42) per cent. may be allowed on sales of harrows, frames and teeth in the following territory:

All of the New England States, also States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia.

A maximum discount of forty-five (45) per cent. may be allowed on all sales made in the territory throughout the United States not mentioned above.

Freight may be allowed to nearest railroad station or steamboat landing.

Terms on sales made prior to June 1st, four months cash from June 1st less ten (10) per cent. discount for cash June 10th.

Terms of sales made after June 1st, four months from September 1st, less ten (10) per cent. discount, for cash September 10th.

The licensee may sell harrows at retail to the local users of harrows at — place of business only, but at a price not less than the net schedule prices named.

In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals this — day of April, 1891.

THE NATIONAL HARROW COMPANY,
By —— ——, *President.*

93 At a special term of the supreme court, held in and for the county of Oneida, at the court-house in the city of Utica, N. Y. on the 13th day of November, 1894.

Present: Hon. P. C. Williams, judge.

NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

A motion having been made in this court by the defendant to vacate and set aside an injunction order granted by Hon. Watson T. Dunmore, dated Sept. 21, 1894, with proof of service of the same upon the defendant by William H. McBride sworn to on the 16th day of October, 1894; the summons and complaint in this action; the affidavit of O. J. Childs, sworn to July 3, 1894; the resolution of the board of directors of the National Harrow Company, dated Dec. 14, 1893; the affidavit of Chas. H. Childs, sworn to July 20, 1894; the affidavit of Roderick O. MacDonald, sworn to July 16, 1894; the affidavit of Emmet Coleman, sworn to June 20, 1894; the affidavit of J. B. Wilson, sworn to June 20, 1894; the affidavit of J. H. Wilhelm, sworn to June 19, 1894; and the license contracts attached to the complaint, being used by the plaintiff in support of the injunction; also the answer of the defendant, heretofore served; the affidavit of Arthur O. Bement, sworn to Nov. 3, 1894; the affidavit of Clarence E. Bement sworn to November 3, 1894; the affidavit of A. Fred. Molitor, sworn to Nov. 3, 1894; the affidavit of D. C. Markham, sworn to Nov. 5, 1894; and the order to show cause, dated Nov. 6, being read on the part of the defendant; also the following affidavit read on the part of the plaintiff in answer to the defendant's moving papers; the affidavit of Warren H. Brinkerhoff, sworn to on the 13th day of November, 1894.

94 And after hearing Hon. H. J. Cookinham for the motion to vacate the injunction and Edwin H. Risley in opposition to vacate said injunction, it is

Ordered, that the injunction herein granted and served on the 9th day of October, 1894, be vacated and set aside upon the defendant executing and delivering to the plaintiff's attorneys a bond, or undertaking with resident sureties, on behalf of the defendant to the effect that it will pay to the plaintiff five dollars ($5.00) or such part thereof as shall be found due plaintiff, upon every float spring tooth harrow, float spring tooth harrow frame without teeth and attachments applicable thereto, sold by it between the date hereof and the trial and decision of this action upon the merits: Providing, that it shall be decided that said plaintiff is entitled to recover that amount, or any part thereof. The bond to be approved as to the form and sufficiency of the sureties by the justice holding this court, on notice to the plaintiff's attorneys.

It is further ordered, that the defendant make and file with the treasurer of this plaintiff, in the event of the defendant giving the bond, as herein provided, between the first and tenth days of each and every month from the date hereof, until the trial and decision

of this action, verified reports and mail the same to the plaintiff of the sales of spring tooth harrows and spring tooth harrow frames without teeth stating the number of spring tooth harrows and spring tooth harrow frames sold during the preceding month; and that in said reports the defendant designate the number which are lever spring tooth harrows and the number of them that are non-lever spring tooth harrows.

It is further ordered, that this case be and the same is hereby referred to W. A. Matteson, Esq, of Utica, N. Y., to hear, try and determine the same, and all the issues therein raised; and that the case proceed before said referee, who is directed to use due
95 diligence in trying the same and bringing it to a speedy determination. Evidence may be taken outside Oneida county in discretion of referee.

Enter,

(S'g'd) WILLIAMS, *J.*

Please to take notice, that the foregoing is a copy of the order this day signed and entered.

RISLEY, ROBINSON & LOVE,
Plaintiff's Attorneys.

Office and post-office address, Herald bldg., Utica, N. Y.

To Cookinham & Sherman, def'ts' att'ys.

STATE OF NEW YORK, } *ss:*
Oneida County Clerk's Office, }

I, Rouse B. Maxfield, clerk of said county and of the supreme and county courts therein, the same being courts of record, do hereby certify, that I have compared the annexed copy of order and the endorsements thereupon with the original thereof on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts at the city of Utica, this 28th day of November, 1894.

[L. S.] R. B. MAXFIELD, *Clerk.*

STATE OF MICHIGAN, } *ss:*
County of Ingham, }

Frank C. McEuen being duly sworn says that he is sheriff that on the 6th day of December, 1894, at Lansing he served the within order and notice on Arthur O. Bement president of the corporation of E. Bement & Sons and that he knew the said Arthur O. Bement is president of the corporation of E. Bement & Sons.

FRANK C. McEUEN, *Sheriff.*

96 Sworn to before me this 10th, day of Dec. 1894.

H. J. BOND,
Notary Public, Ingham Co., Mich.

Notary public certificate. News print, Mason.

STATE OF MICHIGAN, } ss:
County of Ingham, }

I, James Blackmore, clerk of the county of Ingham and clerk of the circuit court for said county, which is a court of record having a seal, do hereby certify that Horatio J. Bond, whose name is subscribed to the certificate of the proof of acknowledgement of the annexed instrument and therein written was at the time of taking such proof of acknowledgement a notary public in and for said county, duly commissioned and qualified and duly authorized to take the same; and further that I am acquainted with the handwriting of such notary public and verily believe the signature to the said certificate or proof of acknowledgement is genuine. I further certify that said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county at Mason, this 10th day of December, 1894.

[L. S.] JAMES BLACKMORE, *Clerk.*

At a special term of the supreme court held in and for the fifth judicial district, at the court-house in the city of Utica, N. Y., on the 7th day of January, 1895.

Present: Hon. Pardon C. Williams, justice presiding.

NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

On reading and filing the affidavit of H. J. Cookinham,
97 verified on the second day of January, 1895, and the pleadings and other papers in this action making satisfactory proof that one or more witnesses not within this State are material and necessary in the prosecution of this action, and on due proof of notice of motion upon plaintiff's attorneys, and after hearing H. J. Cookinham of counsel for defendant and E. H. Risley, Esq. as counsel for plaintiff,

Ordered, that an open commission issue out of this court in this action directed to W. A. Matteson as commissioner, authorizing him to examine on oath E. N. Parsons, Fred J. Cook, W. M. Adams, F. H. Pettibone, E. F. Hartshorn, A. Fred Molitor, Ford J. North, Arthur O. Bement, C. A. Gower, G. W. Bement, Clarence E. Bement, Frank J. Henry, Fred A. Taylor, Nehemiah Chase, Moses Hill, L. C. Lull, W. S. Lawrence, W. J. Lawrence, H. R. Stopel and any other witness who may be produced before him on or before the first day of February, 1895, and that the time and place in the State of Michigan at which the witnesses are to be examined before said W. A. Matteson, be specified by due written notice to the other party, upon oral questions to be put to the witnesses when produced on the issues in this action, and that such person so appointed to take such commission take and certify the deposition of each witness on or before the first

day of March, 1895, and that the same be returned by mail with the commission pursuant to law.

It is by consent further ordered that the disbursements of the commissioner be borne equally by the parties and that the *per diem* charge of fifteen dollars per day to the commissioner be paid by the party on whose application the witnesses on his part are procured and sworn.

Enter,

WILLIAMS, *J.*

98 Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

To the supreme court of the State of New York:

I, William A. Matteson, sole referee in this action, duly appointed by an order of this court, having qualified as such referee, by taking and subscribing the oath required by law, and having been attended by the respective parties to this action and their respective counsel, and having heard all the evidence offered by either party, and listened to the arguments of their respective counsel, and having examined the evidence submitted and duly considered the same, have reached and do make the following decision.

That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following-named parties: D. C. & H. C. Reed & Company of Kalamazoo, Mich.; G. B. Olin & Company Perry and Canandaigua, N. Y.; Chase, Taylor & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J. M. Childs & Company of Utica, N. Y.; and A. W. Stevens & Son of Auburn, N. Y., who began the harrow business in substantially the order named above.

The first two above-named firms conducted their business in separate portions or territory of the United States, under the same United States letters patent, and the other firms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vig-
99 orously prosecuted and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor & Company, and W. S. Lawrence.

Prior to September, 1890, the last four of the above-named firms settled their disputes over patents with the first two firms, and took licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two firms named, and the other parties than that of licensor and licensee under United States letters patent.

In the year 1890, and just prior thereto, other persons, firms and corporations began the spring tooth harrow business and other patent

lawsuits followed: Suits were begun against the defendant- herein, and against their customers purchasing their spring tooth harrows; and one case had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in another suit. Proceedings were pending upon an application for rehearing in these cases.

In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

In the conduct of the spring tooth harrow business, the harrows came to be known in the market as "float spring tooth harrows;" that name having been adopted to differentiate the harrows from those known in the market as "wheel harrows," which had frame bars and curved spring teeth supported from an axle above,
100 which axle had wheels at either end of the diameter above thirty inches. The two classes of harrows were differentiated, one being called a "float" and the other a "wheel" spring tooth harrow. The litigations had been wholly over the "float" spring tooth harrows.

The members composing the first six firms, above named, in the harrow business in September, 1890, organized under the laws of the State of New York the "National Harrow Company." That corporation was duly legally incorporated, and after its incorporation, it received from the said six firms the transfer of their separate U. S. letters patent, license contracts and privileges under patents. The defendant's president, Arthur O. Bement became and continued a director of this corporation until its dissolution, which followed in a little over a year.

This corporation entered into some contracts with spring tooth harrow manufacturer- which were decided by the supreme court of the State of New York to be illegal as against public policy, on account of restraints contained in the contracts which extended beyond the lifetime of the patents. That case is reported in the N. Y. Supplement vol. 18, page 224. Strait, *et al.*, *vs.* National Harrow Company, *et al.*

Immediately following this decision all of the contracts then in existence, which were affected thereby were immediately cancelled by the parties to such contracts.

The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company looking to the selling of its patents and rights under patents relating to the spring tooth harrow business; but this contract was abandoned, the conditions upon which it was executed not having been complied with, the contract became and was wholly void.

The defendant had no contract with the National Harrow Company until about June 16th or 17th, 1891, at which time sev-
101 eral contracts were entered into between the defendant and the National Harrow Company of New York. Among other

contracts the defendant executed and delivered assignments in writing of several U. S. letters patent and license rights and privileges under U. S. letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred and the defendant agreed to accept in payment thereof the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by an arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of $29,000. The defendant was dissatisfied with the amount of the award and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of $16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York Company, the defendant accepted and agreed to take the stock of the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of $45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of $45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

The transactions between the National Harrow Company of N. Y. and this defendant had in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of N. Y. of the U. S. letters patent and licenses
102 under U. S. letters patent relating to the float spring tooth harrow business conducted by the defendant was founded on a good, valuable and adequate consideration moving between the parties.

That as a part of such transaction, the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts A and B which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infring-ments existing between the first six firms named above and the defendant and its customers were settled. The papers which were executed in June, 1891, were all dated as of April 1st, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B the National Harrow Company of New York was the owner by assignment and purchase of a large number of U. S. letters patent which is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

The sale by the defendant of its letters patent, and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B were intended to and did settle existing controversies with reference to the

rights of the National Harrow Company of New York and the defendant.

I decide that the contract entered into in June, 1891, including the contracts "A" and "B" between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts "A" and "B" imposing no restraints upon the defendant beyond those which the parties had a
103 right, from the nature of the transaction, to impose and accept.

In July, 1891, a corporation was organized under the laws of the State of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow business. The New Jersey corporation was duly and legally organized in conformity with the laws of that State, and was by those laws and its charter authorized to purchase United States letter- patent and to grant licenses under United States letter- patent and to conduct the manufacturing business, and had a variety of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

That the National Harrow Company of New Jersey, this plaintiff through its duly constituted officers purchased from the National Harrow Company of New York, all of its various United States letters patent, and all contracts, licenses and privileges which the National Harrow Company of New York then owned and possessed, and also purchased a part of its other property, rights and privileges.

That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable and adequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation,
104 and by the officers and directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent from the New York corporation to the New Jersey corporation.

I decide that this transfer, was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges and benefits accruing to the New York corporation, under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

The defendant's president, Arthur O. Bement, became a director

and an active manager of the plaintiff and continued as such down to September, 1893.

The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of $13,900.

The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B and the plaintiff is now ready, willing and able to perform all of the stipulations and agreements to be performed on its part, as assignee of the National Harrow Company of New York.

That the defendant after having received and retained large pecuniary benefits under the contracts, has failed, neglected and refused, and still fails, neglects and refuses to keep and perform its contracts entered into including the stipulations and provisions contained in contracts A and B and since September, 1893, it has
105 wholly repudiated contracts A and B and refused to perform any of the stipulations contained therein which it agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform.

In the fall of 1892, the defendant began the manufacture and sale of a lever float spring tooth harrow, which it was not authorized or licensed to manufacture, and has continued since that time to manufacture and sell lever float spring tooth harrows contrary to the stipulations contained in contracts A and B and in defiance thereof; that it has wrongfully manufactured and sold prior to January 1st, 1895, in violation of the terms of contracts A and B 2,849 float spring tooth harrows known as "Ajax" harrow-, each of these harrows having a lever attachment applied thereto for simultaneously adjusting the teeth on each section of the harrow. That the defendant has sold in violation of contracts A and B prior to January 1, 1895, six "Reliance" harrows (so called) which are float spring tooth harrows and has also wrongfully sold and delivered prior to January 1, 1895, 382 spring tooth harrows known as the "Lansing" harrow.

I decide that all of these harrows were "float" spring tooth harrows within the intent and meaning of contracts A and B and were sold and delivered by the defendant contrary to the terms and provisions of license contracts A and B and thereby the defendant became liable to the plaintiff in the sum of $5.00 stipulated damages for each harrow wrongfully sold by the defendant, for which sum for each harrow so wrongfully sold by defendant the plaintiff is entitled to judgment against the defendant.

I further decide that the defendant sold and delivered prior to January 1, 1895, 11,834 "Steel King" harrows embraced and covered by contract A and that prior to the date last mentioned, the defendant sold and delivered 3,026 "Clipper" harrows em-
106 braced and covered by contract B making a total of harrows sold and delivered by the defendant, which were covered by

contracts A and B, 14,860, on account of which the defendant has paid $13,900, in royalty, leaving 960 harrows covered by contracts A and B which have not been heretofore reported by the defendant, and on which it has paid no royalties. That the 960 harrows were sold and delivered by the defendant contrary to the terms of license contracts A and B and in violation thereof, and the plaintiff is entitled to recover from the defendant the sum of $5.00 fixed and stipulated damages for each one of the 960 harrows so wrongfully sold by the defendant.

I decide that the plaintiff is entitled to judgment on account of float spring tooth harrows sold by the defendant, contrary to the terms of the license contracts A and B, which the defendant has failed to report and on which harrows it has not paid royalty, the sum of $20,985.

I further decide that the defendant has sold and delivered, without the plaintiff's knowledge or consent, duplicates of the harrows embraced in contracts A and B which it has reported to the plaintiff, and on which it has paid royalties, but which sales were made on terms contrary to contracts "A" and "B," and as the extent or amount of such sales is not made clear by the evidence there should be a reference to take an accounting of the number of harrows so sold by the defendant on which it has paid a royalty to the plaintiff.

I further decide that the word- "float spring tooth harrows, float spring tooth harrow frames and attachments applicable thereto" *was* intended to and did embrace all harrows having curved spring teeth, excluding only wheel harrows employing curved teeth where the frame bars and teeth are supported by an overhanging axletree
on which the wheels are mounted, of more than thirty inches
107 diameter, being the class of wheel spring tooth harrows which were manufactured by the defendant at the date of making the license contracts.

I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction, and that all of the contracts in evidence were and are legal, valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B are and were intended to be continuing contracts and should be enforced according to their true intent and meaning as hereby interpreted.

I decide that plaintiff is entitled to judgment in this action against the defendant as follows:

1st. Declaring the validity of the plaintiff corporation and its title to contracts A and B.

2nd. Decreeing that the contracts, including contracts A and B are good and valid contracts in law.

3rd. Decreeing specific performance on the part of the defend-

ant of all the stipulations and agreements contained in contracts A and B as modified to be by it performed:

4th. Restraining the defendant, its officers, agents, employés and attorneys, from doing, permitting or suffering to be done any act or thing contrary to the stipulations and conditions contained in the license contracts A and B as modified, which the defendant agreed to perform, during the lifetime of such contracts; and that the defendant, its officers, agents, employés and attorneys be enjoined
108 and restrained from selling, or offering for sale any other or different styles or constructions of harrows than duplicates of those specified in contracts A and B in which curved spring teeth are employed, other than wheel harrows employing wheels of a diameter above thirty inches, of the style which defendant was manufacturing at the date of the execution of contracts A and B during the lifetime of contracts A and B.

5th. Plaintiff is entitled to judgment against the defendant on account of harrows sold prior to January 1st, 1895, in violation of the licensed contracts and not reported, and on which no royalties were paid in the sum of $20,985.

6th. That a reference be had to take proof of and state the number of harrows of the styles covered by contracts A and B sold by the defendant contrary to the terms of such contracts, which harrows have been reported as sold by the defendant in its monthly verified reports, and on account of which harrows the defendant has paid a royalty of $1.00 each; and that for the number which shall be found and reported, upon such reference, to have been sold contrary to the terms of contracts A and B, the plaintiff recover from the defendant the sum of $5.00 fixed and liquidated damages on account of each harrow so sold by the defendant, and that the amount thus found to be due from the defendant to the plaintiff is to be credited with and reduced by the amount paid by the defendant to the plaintiff as royalty thereon, the plaintiff to have judgment against the defendant for the amount thus ascertained to be found due.

7th. That the plaintiff is entitled to recover from the defendant its costs and disbursements of this action to be taxed by the clerk.

8th. I decide and direct that judgment be entered in favor
109 of the plaintiff—The National Harrow Company, and against the defendant—E. Bement & Sons, in accordance herewith.

Dated June 5, 1895.

W. A. MATTESON, *Referee.*

Fees, $588.15, paid by plaintiff.

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

This action, having been referred to Hon. William A. Matteson, sole referee, to hear, try and determine the same, he having received the proofs and allegations of the respective parties, and having given

due consideration thereto, and having made and delivered his report, dated June 5, 1895, wherein he finds for the plaintiff and against the defendant, as herein stated.

Now, therefore, on motion of Risley, Robinson & Love, attorneys for the plaintiff, and in accordance with said report it is ordered, adjudged and decreed as follows:

1st. That the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction; and that all of the contracts in evidence were and are legal, valid and binding contracts, such as may reasonably be made under the circumstances, founded upon an adequate consideration, and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade, and tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New
York, including contracts A and B attached to and made a
110 part of the complaint in this action, are, and were intended
to be, continuing contracts; and that the contracts, including contracts "A" and "B" before referred to, are good and valid contracts in law, and that the plaintiff has a good and valid title to said contracts.

2nd. It is further ordered, adjudged and decreed, the plaintiff having performed all of the stipulations and conditions, which it agreed to do and perform under said contracts A and B, and it being now ready, willing and able to perform the same, that the defendant is hereby decreed to specifically perform on its part, all of the stipulations and agreements contained in contracts A and B as modified, to be by it performed, according to the true intent and spirit of the various provisions therein contained.

3d. It — further ordered, adjudged and decreed that the defendant its officers, agents, employés and attorneys be, and they are hereby, enjoined and restrained from doing, permitting or suffering to be done, any act or thing contrary to the stipulations and conditions contained in the license contracts A and B, as modified, which the defendant agreed to do and perform, during the lifetime of said contracts; and that the defendant, its officers, agents, employés and attorneys be, and they are hereby, enjoined and restrained from selling or offering for sale any other or different style or construction of harrows than duplicates of those specified in contracts A and B in which curved spring teeth are employed, other than wheel harrows employing wheels of a diameter above thirty inches, of the style which the defendant was manufacturing at the date of the execution of contracts "A" and "B" during the lifetime of said contracts A and B which contracts bear date April 1st, 1891, and are attached to and made a part of the complaint in this action.

4th. It is further ordered, adjudged and decreed, that the
111 plaintiff do now recover judgment against the defendant E.
Bement & Sons on account of the harrows sold in violation of the license contracts A and B, prior to January 1, 1895, and not reported and on which no royalties were paid, in the sum of twenty

thousand, nine hundred and eighty-five dollars ($20,985) and that the plaintiff have execution therefor.

5th. It is further ordered, adjudged and decreed, that a reference be had to take proof of, report and state the number of harrows sold, of the styles covered by contracts "A" and "B," attached to the complaint in this action, which were sold contrary to the terms of said contracts and which have been reported as sold by the defendant in its monthly verified reports and on account of which harrows the defendant has paid a royalty of one dollar each, and that, for the number which shall be found and reported upon such reference to have been sold contrary to the terms of the contracts A and B the plaintiff recover from the defendant E. Bement & Sons, the sum of five dollars ($5.00) fixed and liquidated damages on account of each harrow so sold by the defendant, and that the amount thus found to be due from the defendant to the plaintiff is to be credited on and reduced by the amount paid by the defendant to the plaintiff as royalties on account thereon; and that the plaintiff, The National Harrow Company, is to have judgment against the defendant E. Bement & Sons, for the amount thus ascertained and found to be due on such accounting; and that the plaintiff have leave to add to the foot of this judgment the amount found due upon the report of said referee, and to have judgment therefor.

6th. It is further ordered, adjudged and decreed that the plaintiff, The National Harrow Company, recover from the defendant, E. Bement & Sons, the sum of fifteen hundred thirty-five and
112 twenty-three one-hundredths dollars ($1,535.23), its costs and disbursements taxed by the clerk.

Damages	$20,985 00
Costs	1,535 23
Total	$22,520 23

Dated June 11th, 1895.

Judgment-roll filed, and judgment signed, entered and docketed this 11th day of June, 1895, at 4.15 p. m.

GEO. D. FRANK,
Deputy Clerk.

STATE OF NEW YORK, } ss:
Oneida County Clerk's Office, }

I, Garry A. Willard, clerk of said county, and of the supreme and county courts therein, the same being courts of record, do hereby certify, that I have compared the annexed copy of judgment-roll and the endorsements thereupon with the original thereof, on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Utica, this 7th day of July, 1895.

GEO. D. FRANK,
Deputy Clerk.

At an adjourned special term of the supreme court held at the court-house in Syracuse, in and for Onondaga county, N. Y., on the 6th day of July, 1895.

Present: P. B. McLennan, judge.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

113 Upon reading and filing an affidavit made by H. J. Cookinham, verified July 5, 1895, and an order to show cause; and the affidavit of Edwin H. Risley, sworn to July 6, 1895; and after hearing H. J. Cookinham of counsel for the defendant, and Edwin H. Risley of counsel for the plaintiff.

It is ordered and adjudged, the plaintiff consenting thereto, that the judgment herein be, and the same is hereby considered as final, the plaintiff in open court waiving the right to an accounting in this action, as directed by the referee's report and the judgment entered therein, and that the record of said judgment be deemed amended accordingly.

And it is ordered on the like consent that the application for an order of reference under the judgment, be denied.

And upon like consent that the fifth clause of the judgment be deemed stricken out, and the judgment amended accordingly.

Enter Oneida county.

P. B. McLENNAN, *J. S. C.*

County Clerk's Certificate.

STATE OF NEW YORK, } ss:
Oneida County Clerk's Office, }

I, Garry A. Willard, clerk of said county, and of the supreme and county courts therein, the same being courts of record, do hereby certify that I have compared the annexed copy of order and the endorsements thereupon with the original thereof, on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts of the city of Utica, this 8th day of July, 1895.

GEO. D. FRANK,
Deputy Clerk.

114 Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

The referee before entering upon the discharge of his duties was sworn and took the oath required by law.

Appearances.

Edwin H. Risley, Esq., for plaintiff.
H. J. Cookinham, Esq., for defendant.
The case was opened by Mr. Risley.

Mr. Risley offers in evidence the original license contract "A," dated April 1st, 1891, and it is marked Plaintiff's Exhibit "1" S. E. J. (Attached to the complaint as "Exhibit A" and printed at page 9 as part of the judgment-roll.)

Plaintiff next offers in evidence the original Exhibit "B" attached to the complaint. Marked Plaintiff's Exhibit "2" S. E. J. (Attached to the complaint as "Exhibit B" and printed at page 18 as part of the judgment-roll.)

Defendant's counsel, when each of the said papers were so offered, objected to the admission of the same in evidence upon the ground that they were incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

Plaintiff next offered in evidence a paper executed by plaintiff and defendant, dated April 1st, 1891.

Objected to upon the same ground as last above.

Objection overruled. Exception to defendant.

Paper received and marked Plaintiff's Exhibit "3" S. E. J. (Printed in the judgment-roll at page 80 and attached to the amended answer as Exhibit "6.")

115 Plaintiff offered in evidence an escrow agreement, dated April 1st, 1891, and marked "Plaintiff's Exhibit '4,' S. E. J." (Attached to the amended answer as Ex. "5" and printed at page 78 as part of judgment-roll, to which defendant objected same as above.)

Objection overruled. Exception to defendant.

Plaintiff offered in evidence agreement signed by the defendant dated April 1st, 1891, and marked "Plaintiff's Exhibit '5' S. E. J." To which defendant objected same as last stated above.

Objection overruled. Exception to defendant.

The following is a copy:

Agreement.

Memoranda of agreement entered into by and between the National Harrow Company and E. Bement & Sons, this 1st day of April, 1891, is as follows:

The National Harrow Company having executed a license to E. Bement & Sons, to manufacture and sell float spring tooth harrows,

the same being held by E. Norris in escrow to be delivered and become operative upon certain conditions in accordance with a contract entered into by and between the National Harrow Company and E. Bement & Sons.

It is hereby agreed by E. Bement & Sons that in consideration of the granting of said license, it will immediately upon delivery of said license pay to the National Harrow Company, a sum of money which shall amount to $1.00 each on all float spring tooth harrows sold and shipped by E. Bement & Sons, from September 10, 1890, to the day that the said license is delivered, the payment to be made either in cash, less interest from the date of said delivery of license to September 1st next, or by bank note payable to order of
116 the National Harrow Company without interest due on the 1st day of September next.

Witness the signature of —— —— the day and year above written.

E. BEMENT & SONS,
By A. O. BEMENT, *Pt.*

Plaintiff offered in evidence an assignment executed by the National Harrow Company of New York to The National Harrow Company of New Jersey, this plaintiff, dated September 9th, 1891. Marked Plaintiff's Exhibit "6," S. E. J. Which is as follows:

Defendant objected to same as before. Objection overruled and exception to defendant.

Articles of agreement, made this 9th day of September, 1891, between "The National Harrow Company" a corporation organized under the laws of the State of New Jersey, party of the first part, and "The National Harrow Company" a corporation organized under the laws of the State of New York, party of the second part.

Witnesseth: That in consideration of the premises each to the other of said parties as hereinafter set forth, and of a valuable consideration passing from each to the other, said party of the first part, hereby promises and agrees and does hereby purchase of the said party of the second part, all its patents and interests in patents applicable in any way to "spring tooth harrows" or any part thereof, and all applications now pending, covering "spring tooth harrows," or parts thereof, and all money, merchandise, licenses, agreements, contracts and property of every name and nature except one thousand dollars in cash, and also all claims and rights of action owned by the said party of the second part, for the sum of $455,000, and to pay therefor, said sum in full-paid-up stock of said party of the first part. Said party of the first part to assume all outstanding debts, obligations, con-
117 tracts and licenses of the party of the second part. The said party of the second part hereby promises and agrees and does hereby sell, assign, transfer and deliver unto the said party of the first part, all its patents and interests in patents, and all applications now pending applicable in any way to "spring tooth harrows" or parts thereof, and all money, merchandise, licenses, agreements,

contracts and property of every name and nature except one thousand dollars in cash, and also all claims and rights of action owned by said party of the second part, upon the condition and for the consideration above named.

In witness whereof, said parties hereunto set their hands by their respective presidents and treasurers at Utica, N. Y., this 9th day of September, 1891.

THE NATIONAL HARROW COMPANY,
[L. S.] By H. H. DURR, *President.*
CHAS. A. LONG, *Treasurer.*
THE NATIONAL HARROW COMPANY OF UTICA, N. Y.,
[L. S.] By CHAS. H. CHILDS, *President.*
EDWARD NORRIS, *Treasurer.*

Plaintiff offered in evidence twenty-two reports on the same blanks, all of them being signed or verified by some officer of the defendant. A copy of one of which is as follows:

"*Monthly Report of the National Harrow Company of New Jersey.*

"All licensees of the National Harrow Company are required to make a verified report to the treasurer on or before the 10th day of each month, — the number in the aggregate of all float spring tooth harrows shipped or delivered during the previous month, except shipments to storehouses for distribution, which are to be reported when reshipped to customers.

118 "LANSING, MICHIGAN, 12, 15, '90.

"Treasurer the National Harrow Company, Utica, N. Y.

"DEAR SIR: I hereby certify in accordance with the requirements of the National Harrow Company as above voted, that the total number of float spring tooth harrows shipped or delivered by E. Bement & Sons from September 10th, to November 1st, 1890, amount in the aggregate to seventy (70) harrows.

"A. O. BEMENT.

"Sworn to before me this 17th day of December, 1890.
"MILTON E. ROBINSON,
"*Notary Public, Oneida County, N. Y.*"

Defendant's counsel objected as incompetent, immaterial and irrelevant, not within the pleadings or contracts Exhibits "1" and "2."

Objection overruled. Exception to defendant.

Number and dates of reports are as follows:

December 15, 1890, 29 harrows.
December 13, 1890, 70 harrows.
January 29, 1891, 177 harrows.
February 19, 1891, 830 harrows.
March 20, 1891, 1,670 harrows.
April 2, 1891, 1,710 harrows.

May 6, 1891, 980 harrows.
June 8, 1891, 341 harrows.
February 17, 1891, 434 harrows.
February 17, 1892, 240 harrows.
February 17, 1892, 313 harrows.
February 17, 1892, 104 harrows.
February 17, 1892, 6 harrows.
February 17, 1892, 15 harrows.
April 16, 1892, 2,010 harrows.
May 7, 1892, 728 harrows.
August 31, 1892, 330 harrows.
119 August 11, 1892, 320 harrows.
August 15, 1892, 330 harrows.
October 18, 1892, 240 harrows.
November 8, 1892, 45 harrows.
December 28, 1892, 10 harrows.

Plaintiff next offered in evidence seven reports, printed on yellow paper, one of the reports reads as follows:

"*Monthly Report to the National Harrow Company of New Jersey.*

"All licensees of the National Harrow Company are required to make a verified report to the treasurer on or before the 10th day of each month — the number in the aggregate of all float spring tooth harrows shipped or delivered during the previous month except shipments to storehouses for distribution, which are to be reported when reshipped to customers."

"LANSING, MICHIGAN, 9, 8, '93.

"Treasurer of the National Harrow Company, Utica, N. Y.

"E. Bement and Sons, licensees of the National Harrow Company make the following statement:

"STATE OF MICHIGAN, } ss:
County of Ingham, }

"George W. Bement being duly sworn, says he is the secretary and treasurer of E. Bement and Sons, licensees of the National Harrow Company. That the total number of float spring tooth harrows, float spring tooth harrow frames without teeth shipped or delivered by said E. Bement and Sons during the month of August, 1893, amount in the aggregate to 54. Deponent further says that the said E. Bement & Sons has not personally or by its officers, agents or attorneys, directly or indirectly shipped, delivered or sold, or made any contract or agreement for shipping, delivering or selling any float spring tooth harrows or float spring tooth harrow frames
120 upon more favorable terms and conditions than those authorized by its license or licenses from said National Harrow Company, or the resolution of said company relating thereto duly passed. Deponent further says, that the said E. Bement & Sons has not

directly or indirectly violated any of the terms or provisions of its license contracts with the National Harrow Company.

"G. W. BEMENT.

"Subscribed and sworn to before me this 8th day of September, 1893.

"H. S. BARTHOLOMEW,
"*Notary Public for Ingham County, Michigan.*"

Objected to by defendant as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

Plaintiff then offers same kind of report as follows:

Report sworn to Aug. 9, 1893, 87 harrows.
Aug. 3, 1893. 74 harrows.
June 14, 1893, 231 harrows.
May 5, 1893, 1,492 harrows.
Report sworn to March 10, 1893, 1,052 harrows.
Jan. 13, 1893, 32 harrows.

The blue papers were marked Plaintiff's Ex. 7, for the use of the court and the yellow papers marked Pl'ff's Ex. 8, for the use of the court.

Mr. CHARLES H. CHILDS, a witness called and sworn for the plaintiff, testified as follows:

My age is 39, occupation manufacturer and general dealer in agricultural implements. I was the president of the National Harrow Company of New York during its entire life and am treasurer of the plaintiff and succeeded Mr. Norris as treasurer of plaintiff. He was treasurer of the National Harrow Company of New York and this plaintiff until his death in February, 1893. On his death I was elected and the papers, records and books kept by
121 the company were turned over to me and have been in my possession ever since. The reports, Exhibits 7 and 8, are all the reports which I find on file in the treasurer's office of the plaintiff and I believe them to be correct as made here, so far as I know.

Q. Will you state when and in what amounts the defendant has paid plaintiff on account of royalties under the two license contracts.

Objected to by defendant as incompetent, immaterial and irrelevant.

Overruled. Exception to defendant.

A. They made payments to apply on royalties in the purchase of license labels as follows:

December 6, 1890, for 1,000 labels	$50
January 29, 1891, for 1,000 labels	50
February 11, 1891, for 1,000 labels	50
February 23, 1891, for 1,000 labels	50
March 5, 1891, for 1,000 labels	100

March 13, 1891, for 500 labels	50
April 1, 1891, for 500 labels	50
April 30, 1891, for 500 labels	50
May 8, 1891, 500 labels	50
January 5, 1892, for 1,000 labels	100
February 27, 1892, for 500 labels	50
March 18, 1892, for 500 labels	50
March 31, 1892, for 500 labels	50
April 11, 1892, for 500 labels	50
May 5, 1892, for 500 labels	50
July 25, 1892, for 500 labels	50
March 1, 1893, for 500 labels	50
March 17, 1894, for 250 labels	25

Making a total of cash received for labels to apply on royalties $975.

The labels used on these harrows prior to March 1, 1891, were furnished at five cents each or five dollars per hundred and after that at ten dollars per hundred.

122 In October, 1890, defendant advanced to the company $1,800 in cash and accepted the company's note. On November 27, 1891, this note was surrendered and applied on royalty account. On the same date defendant's note was accepted by this company amounting to $3,410.70, which was paid at maturity. On November 27th, 1891, defendant was credited interest on the money which was advanced $96.30. On March 30, 1892, defendants were credited expenses, which I think were to cover expenses of A. O. Bement as an officer of the company in attending meetings $160.75. May 31, 1892, the company accepted note of E. Bement & Sons for $1,500, which was paid at maturity to apply on royalties. April 1st, 1892, hey paid cash $513.25. September 14, 1892, paid cash $2,256. September 19, 1893, paid cash $1,498. They were credited a dividend due on the stock of the National Harrow Company held by A. O. Bement $2,712. They were also credited September 19th, expenses $50. In the settlement, September 19, the amount paid also covered royalties due from the North Molitor Company, amounting to $1,047, which was settled by the Bement Company.

The defendant paid royalty on 13,900 harrows. The defendant has made no report on any harrow sold under these license contracts since the report dated September 8, 1893. Defendant has paid no royalties on harrows sold, of any kind, since the first day of August, 1893. The money which I have stated I received since August 1, 1893, was to apply on harrows sold prior to that date with the exception of $25 for the 250 labels which was received March 17, 1894. That would be applicable on royalties, if any, due to the company.

Mr. RISLEY: This is all I care to ask Mr. Childs at this point, I shall probably call him later on.

Mr. COOKINHAM: I shall reserve the cross-examination until then.

123 Defendant concedes that Roderick Oliver McDonald is an accountant; that he was authorized by plaintiff to go to Lansing, Mich., to examine the books of the defendant under the

license contracts one and two, and that he did go there on the 27th day of December, 1893, and ask permission to examine the books of the president of the defendant, and said president refused to allow the books of defendant to be examined for the purpose stated.

EMMETT COLEMAN, called as a witness for plaintiff testified as follows:

My business is general hardware, my age is 38 or 39. I reside at Nichols, Tioga county, N. Y. In 1893, or early in 1894, I purchased seven "Ajax" harrows of E. Bement & Sons of Lansing, Mich. That was a harrow known as a lever spring tooth harrow. Some time in 1894, the goods were received and paid for. I sold six of them and have one left. These harrows had seventeen teeth according to my recollection. I could not swear as to all, but some of them did not have a license tag on of the National Harrow Company.

Q. What price did you pay for these harrows?

Defendant objected as incompetent, immaterial, irrelevant and not within the contract, assuming that the contract is valid.

A. The harrows were paid for at $14.50, less 10 per cent., less two per cent. special rebate and two per cent. for spot cash, less freight. The first six harrows were paid for on the 17th day of April, 1894. The net amount less freight was $61.97. That was paid in check, and the check came back with our vouchers from the bank as paid. The other harrow was paid for at the same rate. The check was sent May 31, 1894, for $10.18, and the check came back from the bank as a voucher having been paid. I received an ac-
124 knowledgement from the defendants for the remittances.

Letter dated June 26, 1894, offered in evidence from defendant to Coleman & Horton and Mr. Risley repeats as follows from the letter:

"We have your favor of the 21st, and have adjusted your account accordingly.

Very truly, E. BEMENT & SONS."

(Marked Ex. 10.)

Plaintiff next offered in evidence letter from defendant to Coleman & Horton, dated June 2, 1894, as follows:

Coleman & Horton, Nichols, N. Y.

DEAR SIRS: We have yours of May 31, enclosing check for $10.18. We think you have made an error of fifty cents in freight and call your attention to the account $14.50, which after having deducted ten per cent. leaves $13.05, then taking off $1.50 rebate, leaves $11.55, instead of $11.05, as you have figured it. Please send us check for this little difference and oblige. The balance of your letter will have prompt attention.

Respectfully, E. BEMENT & SONS.

(Marked Ex. 11.)

Plaintiff offers in evidence a statement dated April 19, 1894, purporting to be signed by E. Bement & Sons.

The defendant objected to — as incompetent, immaterial, irrelevant and not proved.

Mr. RISLEY: This paper shown him was received from E. Bement & Sons through the mail. I offer it in evidence.

(Marked Pl'ff's Ex. 12, S. E. J.)

Mr. Risley repeats same as follows:

"E. Bement and Sons, manufacturers of agricultural implements, stoves and bob-sleds.

LANSING, MICHIGAN, *April* 19, 1894.

Coleman & Horton, Nichols, N. Y.

DEAR SIR: We are in receipt of your favor of 17th inst.
125 enclosed check for $61.97, which we have placed to your credit as follows:

Cash	$61.97
Discount	9.96
Freight	3.07
Total	$75.00

For which please accept our thanks.

Yours truly, E. BEMENT & SONS."

I understand the $69.60 in this account means the discount and difference between the price which they were billed at and per contract they were to be settled for.

I have stated now all the money we paid defendant on account of these harrows and at the time we placed the order for these harrows I supposed defendant to be licensees of plaintiff. I did not know it positively. I had no information in regard to defendant being a licensee of the plaintiff, except I had seen it in a printed list of the National Harrow Company. I do not know where the printed list is now. This class of correspondence is the class that usually finds its way into the waste-paper basket.

Cross-examination by Mr. COOKINHAM:

At the time I made the contract for the harrows with defendant I did not know whether or not they were licensees of the National Harrow Company.

Q. There was an error in the price of one harrow which Mr. Bement called your attention to of 50 cents?

A. They thought there was, but as the letter shows it was right as I sent it; they say; "Yours received and the account is adjusted accordingly." I have no unsettled account with defendant. We settled on the first or second of December, 1894.

126 Mr. RISLEY: I offer in evidence one-half of defendant's harrow known as the "Ajax" lever harrow.

Objected to as incompetent, immaterial and irrelevant.

Received and marked Plaintiff's Exhibit "Ajax" Harrow.

Mr. EMMET COLEMAN, recalled.

Redirect examination:

I have examined the Exhibit "Ajax" Harrow here before the court. It fairly represents the construction of the "Ajax" harrow which we bought of defendant in the early part of 1894. I can't say whether it is of the same pattern and same construction, but I should think it was an exact fac-simile of the left-hand section of the one we had, of course the right-hand section is a little different.

I have handled float spring tooth harrows about ten years, likely more if anything.

Please designate what name or character in the trade would be applied to this "Ajax" harrow to designate it from other harrows?

Objected to by defendant as incompetent, immaterial and irrelevant.

The REFEREE: He may tell how he designates it in his trade.

Exception to defendant.

Well it is what we designate to distinguish it from the ordinary kind, we would designate it as a lever harrow.

Q. What would you understand in the trade by the term float spring tooth harrow?

Objected to as incompetent, immaterial and irrelevant.

The REFEREE: I think he may answer.

Exception to defendant.

I understand a float spring tooth harrow is any harrow not mounted on wheels, that uses spring teeth.

127 Recross-examination:

The first two or three lever harrows I ever saw were made by D. M. Osborne & Company. My recollection is the first lever harrow I ever bought or sold was in 1892. I purchased it of the Eureka Mower Company. I bought and sold wheel harrows ten or twelve years ago. At the same time I bought spring tooth harrows; I mean during the same time I sold wheel harrows. I was selling wheel harrows and spring tooth harrows at the same time. I called a harrow without wheels a float spring tooth harrow to distinguish it from the wheel harrow that we sold at the same time. And the word "float" was used simply to make that distinction. The main object of the wheel was that the spring tooth harrow that we sold also had a broad-casting attachment for sowing seed, etc., and also at the same time harrowing the ground. It acted as a substitute for a drill and the wheels I suppose were to carry not only the weight off the ground and machinery to broad-cast, but also to carry the weight of the harrow.

The wheels were also for the purpose of transporting the harrow from one place to another and they performed the office of regulating the depth the teeth were to go into the ground in connection with the lever. I think the depth was regulated by stirrups instead

of levers. I think the stirrups acted the same as the lever, except that you operated them with the foot instead of the hands and the purchase was from the wheel.

The purpose of the lever on the "Ajax" harrow is to adjust the depth of the teeth in the ground, as I understand it. The same thing in the "Ajax" harrow rests on the ground, in order to get the lever to raise the teeth or lower them that rests upon the ground in all float spring tooth harrows, the frame. The frame of the "Ajax"
harrow rests upon the ground and performs the office of fur-
128 nishing a bearing for the lever when you raise the teeth from
the ground. The frame forms the bearing to hold the teeth out of the ground when the harrow is transported from place to place, and when the harrow is drawn through the field upon the ground, it rests upon the frame, and in that respect the frame performs the same office as the wheel did in the wheel harrow. I understand the frame at all times rests upon the ground in spring tooth harrows, whether the harrow is working or whether it is not, and the points of the teeth will be in the ground, according as the lever is raised or lowered, and the teeth at all times goes into the ground far enough, when in use, so that the frame rests upon the ground, if the ground is soft enough to let it in. If the ground is very soft you use the lever as you do at any other time. If the ground is very soft the frame itself will be buried out of sight.

I cannot say that the defendant made that harrow. It is identical and the same as the ones we had, I will swear to that.

HIRAM ELLIS, a witness called for plaintiff, testified as follows:

My age is 37, I live at Arkport, Steuben county, N. Y. I farm it some and run a hardware store. I made a contract for some of the defendant's harrows in the month of November some time. I have the contract; this is it. The agent signed it and left it with me. His name is Foster.

Mr. RISLEY: I offer this contract in evidence.

Mr. COOKINHAM: I object to it as incompetent, immaterial, and irrelevant; there is no proof that Forster represented the defendant and it is not within the pleading.

The REFEREE: I will receive it with the understanding
129 that you are to connect Forster with the defendant and show
his authority to represent them, and if not so connected and shown it will be disregarded.

Mr. Risley reads:

"Duplicate. Taken by Forster, Arkport, N. Y., November 12, 1894.

E. Bement & Sons, Lansing, Michigan:

Please make and ship me on or about March —, the following goods, viz: best route R. R. on the following terms. Note or acceptance due four mon-hs from Jan. 1st, 10 per cent. June 10th, less freight. It is understood and agreed that this order contains the terms and conditions, under which it is taken, and that no verbal agreements with agents are binding, and that this order is not sub-

ject to countermands after being accepted by E. Bement and Sons. It is also understood that no charges will be allowed for broken, imperfect or defective material, but that E. Bement & Sons will furnish new parts free at the factory for such defective or imperfect material, when held subject to their inspection and order. This order does not bind E. Bement & Sons until it is formally accepted.

No.	Articles.	Price.
1	17-tooth lever Ajax harrow.....	$14.50

Rebate on above harrow $1.05, if six or more are ordered during 1895, then the rebate to be $1.55, on each harrow.

T. H. FORSTER."

Offered in evidence and marked Plaintiff's Exhibit 13, S. E. J.

The agent at the time took this contract and delivered to me a duplicate. After giving this order I wrote to defendant and received an answer to the letter. This is the answer.

Plaintiff offers letter in evidence.

Defendant objects to it as immaterial and irrelevant.

130 Letter received and marked Pl'ff's Ex. 14, S. E. J.

Exception to defendant.

Mr. RISLEY. The following appears on a lithographed letter-head: "Established in 1869, E. Bement & Sons, manufacturers of high-grade stoves, farm implements and bob-sleds, Lansing, Michigan." Underneath this lithographed head, the following appears:

"DECEMBER 7, 1894.

"O. H. Ellis, Esq., Arkport, N. Y.

"DEAR SIR: We have ordered the two sets of bob-sleds shipped you at once from Buffalo. We note what you say about the harrow, but do not cancel the order as the harrow referred to is made under our own patents and are entirely outside of the jurisdiction of the National Harrow Company. We take it that you have received one of their sneaking circulars, which pretends to ask for information, but which is intended to intimidate our customers and maliciously turn trade away from us. We have been in more than one controversy with this National trust and nobody has ever lost anything by it except the trust. Our customers have always been protected and we cheerfully agree to protect you from any damage that may come from any lawsuit brought against you for handling our harrows or any other goods of our make.

"Very truly yours, E. BEMENT & SONS.

"B."

Q. I show you an envelope, is that the envelope this letter came in?

—. Yes, sir; bearing even date with the letter.

I offer this letter in evidence.

Defendant objected, as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

131 The upper left-hand corner of the envelope bears the following: "Return to E. Bement & Sons, Lansing, Mich., if not delivered within five days." Postmarked, Lansing, Michigan, December 7, 7 p. m., 1894, O. H. Ellis, Arkport, N. Y.
Received and marked Pl'ff's Ex. 15, S. E. J.

The harrows mentioned in the order have not been received. The harrows mentioned in the letter are those referred to in the order.

I should say I had handled harrows employing curved spring teeth about 14 years, as near as I can remember. That is, to use it on the farm and as purchaser and seller.

I have examined and seen this half harrow marked "Ajax" harrow. I have just seen it since I came from dinner.

I am familiar with the designation which is applied to a harrow that is drawn on the ground where spring curved teeth are used. That is, I know what they call them over our way.

Q. Please state by what name they are designated.

Objected to by defendant as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

The first one that came, we used to call those float harrows, the Perry harrow. The Perry harrow was the first spring tooth harrow that I ever saw and it was termed a float harrow.

Most of those that call for a harrow now call for a lever harrow. Before the lever harrow came into the market they were called float harrows. Now they are designated lever harrows. The difference between the term float harrow and what is known and designated as a lever harrow is that there are some firms that sell and make the old float harrow and some make the lever harrow, and that is the reason that I make that distinction between the two.

132 Cross-examination:

The difference between the two is that the lever harrow has the teeth adjusted by a lever on the frame and the harrow otherwise performs the same office and work as I understand it. The lever harrow is not exactly the same as the one I call float harrow, like the Perry.

I never saw a lever harrow that was just the same as what I call a float spring harrow, except one thing, the lever. They are not built just the same. It has to be built differently. The one in court is different from any float harrow I ever saw. I never saw a float harrow that could be drawn upon the frame and the teeth could be on the ground, except these that have come into the market lately, unless you set the teeth, then the frame would be lifted and run on the ground irregularly.

Now some of the lever harrows have runners. I do not know whether the runners are attached to the cross-piece or whether it is just the other way, but it is one way or the other. I would hardly say the larger of the two was attached to the smaller, but if I was

going to build one I should think I had to build the frame first. When I have the frame built the runner is attached to one end of the frame and the other rests upon the ground.

The object of the runner is that it is handy to transport it from one field to another; and another thing is not to have it drag into the ground. The runner is also to regulate the depth of the cut. The frame of this harrow in court answers the same purpose as the runner.

I think I never had anything to do with a wheel harrow, but before I ever saw any lever harrows I remember seeing wheel harrows.

Q. And they were distinguished in that way, as wheel harrows?

133 A. Yes, sir. They were called wheel harrows.

In this letter from Bement a circular is referred to. I did not receive the circular before he wrote me. I got an inkling from the Standard-harrow man that there was liable to be trouble in regard to my order for harrows. I don't know what his name was. I then wrote regarding cancelling the order and the answer I received was in regard to having the contract cancelled.

Redirect examination:

In this "Ajax" harrow in court here what is termed by the counsel upon the other side, by the runners, is the outside portions of the harrow frame and the teeth bars are mounted on this device which he calls runners and therefore the whole thing forms a part of the frame of the harrow.

The form of the frame or runners as they may be termed in the "Ajax" harrow is somewhat different from the frame bars of the old Perry harrows. The two harrows perform exactly the same function in harrowing the soil. This "Ajax" harrow in court, so far as its usefulness is concerned, differs only, that you tilt the teeth on the frame out of the ground when you want to transport it and also to adjust the depth of the cut.

All these harrows which I term lever harrows, which I know of, float and drag along on the ground. I have never seen one of the float harrows that was mounted on wheels with an axletree and tongue to it, that is called a wheel harrow or a wheel cultivator. I call them harrows, but there is a cultivator used expressly for that purpose.

The wheel harrow consists of a wheel and an axletree and tongue in it, and the harrow is made adjustable on the axletree, and I would not call that a float harrow.

Recross-examination:

134 I first saw a lever harrow about three years ago. It was D. M. Osborne & Co.'s. I sold some of Osborne's. I sold one of Taylor & Henry's last year.

JOHN J. BAILEY, a witness called and sworn for plaintiff testified as follows:

My business is general hardware, at Dansville, Livingston county, N. Y. I am 58 years old. I have placed an order for spring tooth harrows with defendant within the last year. I have the contract.

(Witness produces it.)

This is the contract that was left with our house.

Mr. RISLEY: I offer this contract in evidence. It is exactly the same as the other, signed by the same agent.

Mr. COOKINHAM: I make the same objection as I did to the order produced by Mr. Ellis.

Same ruling and exception to defendant.

The REFEREE: I will receive it in the same way as I received the other.

Plaintiff offers in evidence contract dated November 15th, 1894, being on the same printed blank as the Ellis order was entered and repeats the written portion.

"Forster, Dansville, N. Y., Nov. 15, 4. us, March 1st, best route 4 months, June 1, ten per cent., June 10 less freight."

In the body of the contract below is the following:

Under No. "1,17 T. lever Ajax harrow $14.50." Below this is "rebate of $1.05 on above harrow if six or more are ordered during 1895, then a rebate of $1.55 will be allowed on each harrow.

T. H. FORSTER."

Marked in evidence as "Plaintiff's Exhibit 16, S. E. J."

My book-keeper communicated with defendant in regard to that order and I received an answer.

(Letter produced.)

I received it by mail.

Mr. RISLEY: I offer this letter in evidence.

135 Objected to by defendant as incompetent, immaterial, and irrelevant.

Objection overruled. Exception to defendant.

Mr. RISLEY: This letter is written on the same lithographed letter-head as letter to Ellis and is as follows:

"DECEMBER 3, 1894.

J. J. Bailey, Dansville, N. Y.

DEAR SIR: Replying to your favor of the 23d inst. enclosing circular from the National Harrow Company would say that as you probably can see by reading between the lines it is a case of pure bluff. We can only say to you that we will see that you are protected in the sale of any goods we sell you. You will not buy a lawsuit, and we shall give you the benefit of our many years' experience

in the line of making harrows and assure you the goods you buy from us will be perfect in every respect.

Respectfully, E. BEMENT & SONS,
By G. W. BEMENT,
Secretary and Treasurer."

Letter marked Pl'ff's Ex. 17, S. E. J.

That harrow has not been received at our store.

I have handled harrows, I should think 15 years. From the time I commenced handling these harrows the term used to distinguish these harrows from spike-teeth or wheel harrows was, the first I bought, called a spring tooth smoothing harrow. The next a harrow manufactured by Chase & Taylor. That was a harrow that had curved teeth. A party never calls for a smoothing or flat harrow; they call it spring tooth, with or without lever. It is distinguished, so far as a man who buys, as a harrow with a lever or without a lever, with spring teeth. There is a harrow sold on the market with spike teeth that is operated by a lever, called a smoothing harrow.

136 Cross-examination:

I first saw a lever harrow I think about three years ago. It was 1892, and was the Clipper of Elmira. Up to that time I had never seen or heard of a lever spring tooth harrow. I have seen a wheel harrow. When I handled the Olen harrow. I handled both of them up to the time the Stevens harrow came out some time in 1888, or 1889. I sold the Stevens harrow which was a float spring tooth harrow, having no wheel, runner or lever. I designated a spring tooth harrow that had no wheel from a spring tooth harrow that did have a wheel simply by calling one a wheel harrow and one plain.

I do not think I ever used the word "float."

Up to 1891 or 1892 anything properly called a smoothing harrow was termed a float harrow. I did understand that the difference between a float spring tooth harrow and a wheel harrow was simply that one had a wheel and the other did not. I used to deal largely in harrows, but do not now.

I cancelled the contract that has been put in evidence for the reason that I was away from home; my book-keeper received some circulars of the National Harrow Company saying or showing there was liable to be some trouble and it was in consequence of the circulars. The order has not been cancelled. The letter I was going to show you my clerk wrote them and that is where it rests.

Redirect examination:

I sold what is termed the Stevens float spring tooth harrow for a while and tried to sell it after the lever attachment was applied to it. The lever attachment was applied to the same harrow which I had before sold without a lever. There was no difference between them, except the application of the lever arrangement for raising and lowering the teeth.

137 Recross-examination:

The harrows were exactly the same, but they put on an extra iron. It was not a success.

WILLIS E. WAITE; a witness called and sworn for plaintiff testified as follows:

I live at Atlanta, Steuben county, N. Y. For the last six years I have been in the hardware business. I purchased in 1893 or 1894, harrows from defendant. I have the contract and order for the harrows that I bought in 1893 or 1894.

(Witness produces papers.)

The contract which I hand you is not the only contract that I have had with E. Bement & Sons with reference to harrows. I had one later. I signed a duplicate of this document at the date of it. The agent Mr. Forster took it. I don't know where he lives.

Contract offered in evidence. It was on the same printed blank as the Ellis contract and Bailey contract were on.

Defendant objects as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

Marked Pl'ff's Ex. 18, S. E. J.

REFEREE: They are received in the same way and the same understanding that the others were.

Mr. Risley then repeats the written portion of the order.

"FORSTER, ATLANTA, N. Y.

Me, at once, best route, 4 months, June 1, 10 per cent., October 1st, less freight. 'Under "-umber" 1, 17 T. lever Ajax harrow $14.60' W. E. Wait. Rebate of $1.05 on above and all other orders during the season of '94.

T. H. FORSTER, *Agent.*"

138 The harrows embraced in this order were received by me some time in October.

I paid for them in cash November 14th, I think, to Forster who gave me a receipt on the statement. I have the statement. I have one of these Ajax harrows. The other item of the bill is seven dollars for a stove.

Bill offered in evidence.

Defendant objects as incompetent, immaterial and irrelevant and not proved.

I received this statement from the house through the mail and when Forster came to our store I paid him the money and he receipted the bill.

The REFEREE: Have you the envelope?

A. I have not.

Where was the envelope postmarked?

I don't remember.

Do you remember the name of E. Bement & Sons on it?

I don't remember.

Mr. RISLEY: I will read statement in evidence.

REFEREE: I will receive it as the others in the same way.

Exception to defendant.

Mr. RISLEY: I will give the following which is in lithograph print: "Statement, folio, Lansing, Mich., 189–, established in 1869, in account with E. Bement & Sons manufacturers of high-grade stoves, farm implements and bob-sleds, terms, accounts past due subject to sight draft without notice." Then comes a red line, and the following: "To balance as per statement; to merchandise as per bill rendered." At the bottom is a red line drawn and underneath it the following: "Unless otherwise stated will make blank draft on the — instant for $—. Please honor same upon presentation." Running up and down, vertical lines for dates and amounts
139 are ruled on the paper. Now I read the written portions in these printed blanks. "14 O" (referring to the folio) "October 9, 4." "W. E. Wait, Atlanta, N. Y. May 25, $7.00" "May 29 $14.50" footing of both extended to the right "$21 50." "Credit July 24, $1.05." A line is drawn under it, and underneath the line "$20.45." "Freight .50 and .75" total "1.28" carried under the total footing and subtracted make "19.17." Underneath this "November 14, '94. Received payment, E. Bement & Sons, by Forster."

Received and marked Pl'ff's Ex. 19, S. E. J.

I paid E. Bement & Sons $19.17. I don't know that that was just the even number of cents, but I suppose I did. After I paid that to Forster I received by mail a paper from defendant. A cashier's receipt. I have that paper.

(Witness produces paper.)

Q. Is that it?

A. It is.

Mr. RISLEY: I now offer cashier's receipt for bill.

Defendant's counsel objects as incompetent, immaterial and irrelevant and not proven.

Marked Pl'ff's Ex. 20, S. E. J.

I do not remember that Bement's name was on the printed corner of the envelope that this was in.

REFEREE: Mr. Cookinham specially objects that it is not sufficiently proved and I don't think it is.

Mr. RISLEY:

Q. Have you got the check you gave for this bill?

—. I paid for it in cash.

REFEREE: I think Mr. Cookinham it better be received subject to a motion to strike it out in the event that it is not connected with defendant.

Exception to defendant.

Mr. RISLEY: I read now from the statement "cashier's receipt."

140 E. Bement & Sons, manufacturers of stoves, farm implements, and bob-sleds.

LANSING, MICHIGAN, *November* 19, '94.

W. E. Wait, Atlanta, N. Y.

DEAR SIR: We are in receipt of your favor of the 15th inst. enclosing check for $19.15, which we have placed to your credit as follows: (T. N. Forster) cash $19.15 discounts — underneath that "$1.30" line underneath, then total "$20.45." "For account of T. H. Forster. Please accept our thanks. Yours truly E. Bement & Sons, R." (E. Bement & Sons is printed and the "R" is in writing.)

I made a second order with Mr. Forster for harrows. I have it.

Witness produces paper.

This is the document.

Plaintiff's counsel offers same in evidence and it is marked Plaintiff's Exhibit 21, S. E. J.

Defendant's counsel objects as incompetent, immaterial, irrelevant and not proved.

Objection overruled, exception to defendant.

This order is on the same blank as Ellis and Bailey orders. The written portion is as follows:

"FORSTER, ATLANTA, N. Y., *November* 14, 4.

Me, March, best route, 4 months, June 1st, 10 per cent., June 10th, less freight. Under No. —, 3 17-tooth lever Ajax harrows $14.50. This order may be countermanded up to February 1st, '95. W. E. Wait. Rebate of $1.55 on each of the above harrows and all others ordered during 1895.

T. H. FORSTER."

I have not received these harrows, they are to be shipped in March. I understand the harrows are $14.50 less the following. I have received a letter from defendant with reference to this order.

Witness produces letter.

I received it by mail shortly after it bears date. I have not the envelope.

Plaintiff's counsel offers the letter in evidence.

141 It was received in answer to a letter that I wrote them. My letter was addressed to them at Lansing, Mich., and this answer came back.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant and not proved.

REFEREE: I will receive it the same as the others.

Exception to defendant.

The letter is on a printed lithographed letter-head, it being the ordinary letter-heads of the defendant. The written portion is as follows:

DECEMBER 10, '94.

W. E. Wait, Esq., Atlanta, N. Y.

DEAR SIR: We have yours of December 7th. Kindly let us know by return mail what papers they have served on you. We have heard of nothing except a sneaking little circular which pretends to ask for information but which really is intended to frighten dealers who are not acquainted with the situation. This is a time-worn trick which lost its virtue many years ago. Our harrows are made under our own patents and we control the sale of them. We have had controversies with the National Harrow Company in the past and have demonstrated our ability to take care of ourselves and our customers. We agree to protect you from all harm because of any suit which they may bring against you for handling our tools. Kindly let us hear from you and note that we do not cancel the order.

Very truly yours, E. BEMENT & SONS.

(Stencil printed) underneath which the letter "B" is in writing. Received and marked in evidence as Plaintiff's Exhibit. 22, S. E. J.

I have no other letter from defendant, except one asking that the account be paid.

(Witness produces letter.)

142 I received this by mail shortly after date. It refers to the harrows which are mentioned in the first contract.

(Letter offered in evidence.)

Defendant's counsel objects to it as incompetent, immaterial and irrelevant.

REFEREE: I will receive it the same as the others were received. Marked Pl'ff's Ex. 23, S. E. J.

Exception to the defendant.

The written portion is as follows:

Mr. RISLEY: The written portion is:

"OCTOBER 12, '94.

W. E. Wait, Atlanta, N. Y.

DEAR SIR: We made a draft on October 1st, for $13.45 amount of your account due on that date. This draft has been returned with a notice on the back, 'no attention.' As the account was due October 1st, we presume that the bank was not diligent in presenting this draft to you, and we ask that you kindly favor us with a remittance covering the same by return mail, or if you prefer, you may have our second draft.

Yours respectfully, E. BEMENT & SONS."

(Printed in stencil underneath.)

This was received before I paid Mr. Forster the money. The draft referred to was presented to me and I declined to receive it. I have handled harrows employing curved teeth five or six years. I know of no designation as to harrows employing curved teeth, only the first without a lever, was simply, they could call for a spring tooth harrow and since the lever came in they either call for a harrow with or without a lever. The parties that come to my store to buy designate them as either lever harrows or without levers. No other way.

The two kinds of harrows perform the same functions in harrowing the ground. With the lever they are much quicker to adjust. But when they are in use they do the same work. I never handled wheel cultivators.

143 Cross-examination:

Although the harrows whether they have a lever or not perform the same functions; they harrow the ground. But they are handled in a different way. The adjusting can be more quickly done in one harrow than in the other. One is adjusted by a lever and the other is adjusted by changing each tooth by itself. I never used or saw a lever harrow used. The old-fashioned harrow could not be transported through the fields by lifting the tooth out of the ground so that the harrow rested upon the ground or upon the runner attached to the frame, unless they should adjust the teeth I do not know but that they could turn them far enough. If they could adjust they separately it would not be a practical way of doing.

Before the lever harrows came out I have heard the spring tooth harrow called a float harrow as agents term it. I have heard them speak of float harrows or wheel harrows; I can't tell who I heard call them so. Before the lever harrows came out I don't think I ever heard the word "float" applied to them.

In '91 I would not understand what was considered in the trade as a float spring tooth harrow.

I asked to cancel the last order because I did not care to get into any entanglement or bother. I was induced to do that when I found out that they were not in the combination. I found that out by being subpœnaed in this case, and after I received the subpœna I notified them I desired to cancel the order and it was cancelled. For the reasons stated I did not care to get into a difficulty like this which might be little or large, because they claimed the harrow was not licensed.

Redirect examination:

144 I should think they could adjust the non-lever spring tooth harrow teeth independently so as to transport the harrow in the same manner as it would be transported with a lever attachment, but I don't think it would be a desirable thing to do. The harrows work the same in both styles; that is, they dig into the ground.

Plaintiff's counsel offered in evidence a float spring tooth harrow,

wood frame lined, with teeth, marked No. 15, being one of the harrows referred to and designated in Exhibit "1."

Received and marked "Pl'ff's Ex. Bement Harrow Frame."

Plaintiff offers in evidence a float spring tooth harrow, channelled or "1" beam steel frame, (Steel King). Marked E. Bement & Sons, Lansing, Mich., December 16, 1890. No. 14, being one of the harrows mentioned in Exhibit "1."

Same received in evidence and marked Pl'ff's Ex. (Def't's Steel King).

WARREN M. BRINKERHOFF, a witness called for the plaintiff testified as follows:

My age is 41. I reside at Auburn, N. Y., am secretary of the National Harrow Company and a manufacturer. Have been connected with the National Harrow Company of New York and of New Jersey, with the exception of a few days, since its organization to the present time. My duties as secretary and general manager of its business are particularly of matters relating to its license contracts, patents and details arising in connection with its licenses and in connection with this business; I am familiar with the various styles and constructions of the spring tooth harrows that have been manufactured throughout the United States since my connection with the company. Before the organization of the company I had business relations in regard to spring tooth harrows. In the first in-
145 stance with A. W. Stevens & Son of Auburn, N. Y., and had entire charge of all matters, outside of the manufacture and sale, in connection with their spring tooth harrow business, including the prosecution of their applications for patents, several in number, the construction of their spring tooth harrows and in all other points.

A. W. Stevens & Son was a copartnership consisting of Abram Stevens and Le Roy W. Stevens, manufacturers of farm machinery, threshers, engines, milling machinery and spring tooth harrows at Auburn, N. Y. I had charge of their spring tooth harrow business from June, 1887, until they became licensees or members of the National Harrow Company in 1890. I know the defendant. Arthur O. Bement is president of the defendant and G. W. Bement is secretary and treasurer I believe. I have seen and know the sections of the harrow which E. Bement & Sons deposited with the treasurer of the company as the harrow which they were licensed to build in the first instance. One of the sections illustrating two of the sections is here in court, known as the Clipper wood frame spring tooth harrow. The other exhibit termed "Steel King" is in the hands of the court in the case of Bement against La Dow.

Arthur O. Bement was first vice-president, a member of the executive board, and a member of the board of directors of the New York company from its organization to its dissolution. He held a like position in the National Harrow Company of New Jersey up to September 13, 1893. At that meeting, the annual meeting in 1893, he wasn't elected a director, he was elected a director at the New York meeting in 1894. I call to mind the meeting of the board of

directors, at Murray Hill hotel, New York, about September 11, 1892. Mr. Bement was present. The subject of licensing the then existing licensees of plaintiff to build lever harrows was a subject of discussion at that meeting in all its details; the matter was
146 canvassed very thoroughly. Prior to that meeting in 1892, D. M. Osborne & Co. of Auburn had been selling a lever float spring tooth harrow. At that meeting in September there was a committee appointed to consider the subject of the right of the licensees of the company to build a lever harrow under the then existing licensees of this plaintiff. Some of the members of that committee were C. H. Childs, A. O. Bement, I think Mr. Stewart, N. H. Stewart, an attorney of Kalamazoo, and one or two others; Charles H. Duell, he was a patent lawyer of Syracuse. The committee made a report to the board. I believe the report was in writing. I would have to refer to the books to refresh my memory. A committee was appointed to consider the subject of lever harrows. The first motion that was made with reference to lever harrows was made by C. H. Childs and A. O. Bement, temporary chairman, moved to appoint a committee to investigate the question of lever harrows. That committee was Charles H. Childs, Victor P. Van Horn and F. J. Henry. That committee was simply for the purpose of investigating patents. Immediately following that a resolution was offered by A. O. Bement, with reference to the licensees having the right to build, and stating conditions that would be required for them to build lever harrows. That resolution by motion of Mr. Stevens, was referred to the following committee: A. O. Bement, L. W. Stevens, W. M. Brinkenhoof. C. H. Duell, and James H. Manning, who was treasurer of the Syracuse Chilled Plow Company. That committee made a report on that resolution, or made a report on the subject of Bement's resolution.

Objected to as incompetent, immaterial and irrelevant. Defendant does not object because the record is not authenticated.

Objection overruled. Exception to defendant.

(Witness proceeds)

147 I have now before me a resolution as adopted by the board of directors at the meeting in 1892, with reference to lever harrows. It is from the regular minute book of the company.

Defendant objects to the reading of the resolution as incompetent, immaterial, irrelevant.

Objection overruled. Exception to defendant.

"Resolution by A. O. Bement, resolved: That the National Harrow Company license all its licensees to build lever spring tooth harrows on the following conditions:

1st. That there be added to the executive committee one member from the board of directors by a majority vote thereof to act with the executive committee for the purpose of passing upon harrows submitted to the committee, for which a license is desired.

2d. That the party desiring a license, submit to the committee a full-size working harrow as proposed to be built and if it appears to

the committee that the said harrow does not infringe on the rights of other licensees, then they shall be in power to issue said license. The said committee shall require an approved bond from the said licensees, guaranteeing to hold the National Harrow Company safe from all harm on account of said license and issue the said license subject to the conditions of said bonds.

3d. The National Harrow Company shall have full charge and control of the defense of any and all suits brought against the licensees of the National Harrow Company arising from the granting of said licenses.

4th. The said committee shall meet on November first next at Auburn, and pass upon any application then on file accompanied by a sample of a full-sized working harrow. In case any licensee is not ready to submit a sample of its proposed harrow at that meeting, then the committee will meet by request of said licensees upon
148 thirty days' notice or prior thereto at the call of the president to do so and pass upon said request. Any party obtaining a license to manufacture lever spring tooth harrows, shall assign to the National Harrow Company any and all patents, applications, licenses or other rights they may hold, obtain or control, which have reference to harrows, coming within the scope of such licenses. Royalties or lever harrows to be the same as required to be paid under present license, on other styles of harrows and payable at the same time and in the same manner. The licensee or applicant for a license shall produce with his application the file-wrapper contents of any patent, also abstract of title to such patent or patents which are to be assigned as per condition of this resolution, also copies of all drawings and specifications of pending cases."

That resolution was adopted. Subsequent to that meeting and prior to the first of November, 1892, there was a meeting of the board of directors of the company at Buffalo. At that meeting the portion of the resolution in reference to giving a bond was eliminated by vote of the board of directors. A member of the board of directors was added to the executive committee. It was Heber C. Reed. The executive committee excluding him consisted of Charles H. Childs, Arthur O. Bement, L. W. Stevens, and Frank H. Henry. That board with Mr. Reed met at Auburn on the 1st day of November, 1892, and had their lever harrows, duplicates of which the various licensees of the company desired to build. These harrows were examined by the executive board.

By Mr. RISLEY:

Q. Will you state what was the action of the executive board with reference to licensing the defendant to build a duplicate of the lever harrow which they had at this meeting?

149 Objected to as incompetent, immaterial and irrelevant. Objection overruled, exception to defendant.

A. They voted to grant the license.

Q. What was done, if anything, by the executive committee at

that meeting with refer-nce to the form of lever licenses which the company was to grant to its licensees?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. It was thought necessary to make some changes in the language of the license contract.

Q. Changes from the previous license?

A. Yes, sir; and after the details of the terms, conditions and prices, etc., had been arranged, this matter was left to a committee, composed of L. W. Stevens, L. H. Childs, and myself.

Q. Who made the changes in the lever license from the licenses which were then in existence and give the circumstance- of the change?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. Really the only change required at the time, as all the details connected with the sales department, etc. had been arranged, was something that would clearly designate the difference in the two papers, the old license and the new, and the matter was left almost wholly to myself to arrange what I thought was necessary to designate such differences. In connection with my duties with the company, it is very frequently necessary for me to send to my office when I am away—the old license simply set forth and describe the harrows or term them rather float spring tooth harrows, and the only change that was made in these papers outside of the
150 terms and conditions of sale, and one or two minor details, was adding the word "lever" so that the harrows would be termed lever float spring tooth harrows in the new license. There was a difference between the non-lever float spring tooth harrow and the price of the lever float spring tooth harrow in the licenses themselves. And the designation "lever" was upon my own suggestion entirely as used in that connection. I submitted the form of the license with the changes which I made to the committee appointed to make such changes. A. O. Bement made the motion in the board to appoint the committee to superintend the form of the license and changes to be made.

Q. Did the committee approve of your form of license?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. They did. After approval I had this license contract printed. I have one of the printed forms.

Q. Did you fill up a blank form of the lever license and mail it to the defendant for execution?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. I did, or else it was done under my direction at my office.

Section of harrow shown witness who says: This is a section taken

by myself from the lever float spring tooth harrow filed with me by E. Bement & Sons as their exhibit, upon which the National Harrow Company voted to grant them a license to sell at Auburn, November, 1892.

This section represents the front cross-bar of the harrow and on the one end, a hinged section which connects it with the side bars or lower frame section of the harrow, and intermediate of the ends, cross-bars and projecting arm for attachment to the lever construction for tilting or rolling the bar.

151 Section and remaining portion of the harrow offered in evidence and marked "Plaintiff's Exhibit, Bement's Lever Harrow."

Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

Paper produced. Witness, says this is blank lever license contract into which all the lever licenses granted by the plaintiff have been written or filled with the exception of D. M. Osborne.

This paper offered in evidence and marked Plaintiff's Exhibit 23, S. E. J. Objected to as before, overruled, exception. Which is as follows:

License Contract.

Whereas, certain letters patent of the United States of America were issued to sundry parties and are now owned by the National Harrow Company a corporation organized and doing business at the city of Utica, in the county of Oneida, and State of New York, for new and useful improvements relating to lever float spring tooth harrows, and float spring tooth harrow frames, and attachments applicable thereto, and are numbered and dated as follows to wit:

150,976, May 19, 1874.
197,703, Nov. 27, 1877.
205,449, June 25, 1878.
224,274, Feb. 10, 1880.
224,722, Feb. 17, 1880.
227,683, May 18, 1880.
233,718, Oct. 26, 1880.
239,947, April 12, 1881.
244,100, July 12, 1881.
245,718, Aug. 16, 1881.
251,208, Dec. 20, 1881.
264,360, Sept. 12, 1882.
271,938, Feb. 6, 1883.
152 278,287, May 22, 1883.
301,375, July 1, 1884.
309,800, Dec. 23, 1884.
337,951, March 16, 1886.
359,970, March 22, 1887.
361,792, April 26, 1887.
367,462, Aug. 2, 1887.
371,903, Oct. 18, 1887.
375,510, Dec. 27, 1887.
197,515, Nov. 27, 1877.
201,946, April 2, 1878.
224,273, Feb. 10, 1880.
224,275, Feb. 10, 1880.
232,192, Sept. 14, 1880.
235,071, Dec. 7, 1880.
241,528, May 17, 1881.
245,033, Aug. 2, 1881.
250,065, Nov. 29, 1881.
262,918, Aug. 22, 1882.
266,348, Oct. 24, 1882.
272,939, Feb. 27, 1883.
284,278, Sept. 4, 1883.
309,416, Dec. 16, 1884.
327,340, Sept. 29, 1885.
359,539, March 15, 1887.
360,975, April 12, 1887.
362,626, May 10, 1887.
371,902, Oct. 18, 1887.
374,159, Nov. 29, 1887.
375,511, Dec. 27, 1887.

R. 10893, Jan. 10, 1888.
378,081, Feb. 21, 1888.
382,304, May 8, 1888.
386,094, July 10, 1888.
388,306, Aug. 21, 1888.
392,311, Nov. 6, 1888.
393,108, Nov. 20, 1888.
393,344, Nov. 20, 1888.
396,944, Jan. 29, 1889.
400,397, March 26, 1889.
403,976, May 28, 1889.
405,580, June 18, 1889.
413,352, Oct. 22, 1889.
413,499, Oct. 22, 1889.
416,995, Dec. 10, 1889.
419,990, Jan. 21, 1890.
421,789, Feb. 18, 1890.
423,705, March 18, 1890.
426,695, April 29, 1890.
428,329, May 20, 1890.
434,962, August 26, 1890.
436,445, Sept. 16, 1890.
445,842, Feb. 3, 1891.
446,820, Feb. 17, 1891.
453,058, May 26, 1891.
454,324, June 16, 1891.
348,534, Sept. 7, 1886.
153 358,839, March 8, 1887.
401,833, April 23, 1889.
402,079, April 23, 1889.
455,497, July 7, 1891.
470,390, March 8, 1892.
377,053, Jan. 31, 1888.
379,018, March 6, 1888.
386,021, July 10, 1888.
386,847, July 31, 1888.
390,065, Sept. 25, 1888.
392,312, Nov. 6, 1888.
393,156, Nov. 20, 1888.
396,696, Jan. 22, 1889.
399,731, March 19, 1889.
400,398, March 26, 1889.
405,459, June 18, 1889.
412,428, Oct. 8, 1889.
413,498, Oct. 22, 1889.
413,538, Oct. 22, 1889.
419,971, Jan. 21, 1890.
420,848, Feb. 4, 1890.
422,406, March 4, 1890.
426,666, April 29, 1890.
428,310, May 20, 1890.
434,110, Aug. 12, 1890.
435,706, Sept. 2, 1890.
438,123, Oct. 7, 1890.
446,105, Feb. 10, 1891.
449,649, March 31, 1891.
453,672, June 9, 1891.
454,474, June 23, 1891.
356,985, Feb. 1, 1887.
358,950, March 8, 1887.
401,883, April 23, 1889.
402,629, May 7, 1889.
463,594, Nov. 17, 1891.

And whereas —— —— desires to acquire the right to use in — business in the manufacture at —— and sale throughout the United States, of lever float spring tooth harrows, harrow frames without teeth and attachments applicable thereto, in — name under the aforesaid patents or some one or more of them, and under all other patented rights owned or hereafter acquired by the National Harrow Company which apply to and embrace the peculiar construction employed by —— —— during the terms of such patents or any or either thereof, applicable to and embracing such construction.

Now therefore, know all men by these presents, that the National Harrow Company, licensor, has given and granted under the patents as aforesaid, and by these presents does give and grant under the patents as aforesaid to —— —— the license and privilege of using the rights under the patents as aforesaid in — said business of manufacturing, marketing and vending to others to be used, lever float spring tooth harrows, lever float spring tooth harrow frames without teeth and attachments applicable thereto, a sample of which harrows, harrow frames and attachments which said —— ——

is licensed to manufacture and sell, *are* in the possession of the treasurer of the National Harrow Company and marked and numbered as set forth in Schedule "A" made a part hereof. This license is granted upon following terms, viz:

First. —— —— shall pay or cause to be paid to the National Harrow Company on the first day of September of each year
154 during the continuance of this license as royalties, the sum of one dollar for each and every lever float spring tooth harrow, or lever float spring tooth harrow frame without teeth sold by — in pursuance of the strict terms of this license, on all sales made prior to the first day of August preceding September of the year in which the royalty is payable; all of which royalties and sums provided by this agreement shall be payable at the office of and to the National Harrow Company in the city of Utica, N. Y.

Second. —— —— agrees that between the 1st and 10th of each and every month during the continuance of this license, — will make verified reports to, and mail the same to the said National Harrow Company of sales of lever spring tooth harrows and lever spring tooth harrow frames without teeth, stating the number of lever float and spring tooth harrow-, and lever spring tooth harrow frames sold during the preceding month; and —— —— further agrees to keep books in which — shall enter such sales, which books shall be open for inspection of the National Harrow Company, or any duly authorized agent or attorney thereof, during business hours. The National Harrow Company may take statements or extracts from said books, and for the purpose of this license, a sale shall be considered as made when the harrows or harrow frames without teeth are shipped or delivered to the purchaser. —— —— agrees that it will not ship lever float spring tooth harrows, lever float spring tooth harrow frames without teeth or attachments applicable thereto, to any person, firm or corporation to be sold on commission, or *to* allow any rebate or deduction from the price or prices fixed in this license, except to settle with an insolvent debtor, for harrows, harrow frames or attachments applicable thereto, previously sold or delivered.

155 Third. —— —— agrees that — will not during the continuance of this license, sell lever float spring tooth harrows, lever float spring tooth harrow frames without teeth or attachments applicable thereto, manufactured under this license, or for this licensee by another licensee as herein provided at a less price, or on more favorable terms of payment and delivery to the purchasers than is set forth in Schedule B, made a part of this license, except as hereinafter provided.

Fourth. The National Harrow Company reserves the right to decrease the selling prices and to make the terms of payment and delivery more favorable to the purchaser, and to reduce the royalty on lever float spring tooth harrows, lever float spring tooth harrow frames without teeth and attachments applicable thereto, manufactured under this license.

Fifth. The National Harrow Company agrees that it will furnish on request to —— —— license labels at the price of ten cents each,

in lots of not less than one hundred, and — agrees that — will affix one of said labels to each lever float spring tooth harrow, and to each lever float spring tooth harrow frame without te th, before shipping the same from — factory, and the amount paid for such labels by —— —— shall be credited and allowed on the royalty at the time of payment of said royalty.

Sixth. —— —— agrees that it will not, during the continuance of this license, be directly or indirectly engaged in the manufacture or sale of any other lever float spring tooth harrows or lever float spring tooth harrow frames without teeth, or attachments applicable thereto, than those which — is licensed to manufacture and market under the terms of this license, except such as — may manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee shall be licensed by the National Harrow Company to manufacture
156 and sell, except such other style and construction as it may be licensed to manufacture and sell by the National Harrow Company.

Seventh. —— —— agrees to pay to the National Harrow Company for each and every lever float spring tooth harrow, lever float spring tooth harrow frame without teeth or attachments applicable thereto, manufactured or sold by it, contrary to the strict terms and provisions of this license, the sum of five dollars, which is hereby agreed upon and fixed as liquidated damages therefor.

Eighth. —— —— agrees that during the term of this license — will not, directly or indirectly in any way, deny or contest the validity of any of the patents applicable to and embracing the construction which — is licensed to manufacture or that — may manufacture for another licensee, which said licensee is licensed to manufacture and sell, or the reissues thereof, or the sufficiency of the specifications thereof or the validity of the title of such letters patent or reissues, and hereby concedes the right of the National Harrow Company to make or grant any other licenses to others, and no act of either party shall invalidate this admission and said —— —— will not alter or change the construction of the lever float spring tooth harrows, lever float spring tooth harrow frames without teeth or attachments applied thereto, which — is authorized to manufacture and sell under this license, in any part or portions thereof which embody any of said inventions covered by such letters patent, or any of them, or any reissues thereof.

Ninth. Nothing contained in this license shall be construed to authorize or permit —— —— to manufacture or vend, or procure to be manufactured or used, directly or indirectly, any other or dif-
157 ferent style of lever float spring tooth harrows, lever float spring tooth harrow frame without teeth or attachments applicable thereto, than duplicates of such samples as deposited by — with, and in the possession of the treasurer of the National Harrow Company, and embraced in this license, or any part thereof, embraced in or forming a part of such invention described in the patents hereinbefore mentioned, or the reissues of such patents, except such portions thereof, as — may supply to another licensee of

the National Harrow Company, which such other licensee shall be licensed to manufacture and sell.

Tenth. Any departure from the terms of this license by the licensee may, at the option of the National Harrow Company, be deemed and treated as a breach of this license, and the licensee may be treated as an infringer; or the National Harrow Company may restrain the breach thereof in a suit brought in any court of competent jurisdiction, and may apply for and obtain an injunction restraining the further breach thereof, and the licensee waives the right of trial by jury, which remedy shall be in addition to the liquidated damages hereinbefore provided for.

Eleventh. The termination of this license by the National Harrow Company shall not release the licensee from its obligation to pay the royalties and sums hereinbefore provided for harrows and harrow frames without teeth and attachments applicable thereto, manufactured or sold by it up to the time of the termination of this license by said National Harrow Company, which royalties and sums shall thereupon become due and payable immediately.

Twelfth. The National Harrow Company agrees to defend —— —— in any suit brought for an alleged infringement on account of the manufacture or sale of lever float spring tooth harrows, lever float spring tooth harrow frames without teeth or attachments
158 applicable thereto, manufactured or sold under this license which — is licensed to manufacture or sell, and to pay any costs or damages recovered in said suit, providing it is notified of the suit, and allowed to appear and conduct the defense.

Thirteenth. No royalties or liquidated damages shall be paid to the National Harrow Company for lever float spring tooth harrows, lever float spring tooth harrow frames without teeth, or attachments applicable thereto, exported for use in a foreign country.

Fourteenth. This license is personal to the licensee and is not assignable by — or by operation of law, except to the successors of —— —— in the same place and business, without the written consent of the licensor, nor shall the royalties or sums hereinbefore specified cease to be paid under any circumstances whatever except under the conditions named in this license, during the continuance thereof. This license applies only to lever float spring tooth harrows, lever float spring tooth harrow frames without teeth and attachments applicable thereto.

Fifteenth. It is agreed by and between the parties hereto, that this license shall continue during the term of the patent or patents applicable to and embracing the construction- licensed hereunder and during the term of any reissues thereof.

Sixteenth. The place of performance of this agreement shall be the city of Utica, N. Y., and this agreement shall be construed, and the rights of the parties thereunder determined according to the laws of the State of New York.

Seventeenth. This contract or license, and each of the provisions therein contained, is made in consideration of one dollar paid by each of the parties to the other, the receipt of which is hereby

acknowledged, and for value received by each from the other,
159 and the covenants therein contained to be performed by the other, and shall apply to and bind the parties thereto, their successors, heirs and assigns.

SCHEDULE "A."

Eighteenth. This schedule embraces harrows, harrow frames without teeth and attachments applicable thereto, duplicates of which the licensee is authorized to manufacture, sell use and vend to others to be used, but always as licensee under the terms of this license.

1. A lever float spring tooth harrow, marked number —.
2. A lever float spring tooth harrow, marked number —.
3. A lever float spring tooth harrow, marked number —.
4. A lever float spring tooth harrow, marked number —.

SCHEDULE "B."

Nineteenth. Prices and terms of sale under this license:

14-tooth lever harrow	$13 50
15-tooth lever harrow	13 50
16-tooth lever harrow	14 00
17-tooth lever harrow	14 50
18-tooth lever harrow	15 00
19-tooth lever harrow	15 50
20-tooth lever harrow	16 00
22-tooth lever harrow	17 00
23-tooth lever harrow	17 50
24-tooth lever harrow	18 00

For lever harrow frames complete, less teeth, also single teeth, same as in license on float spring tooth harrows without levers.

Freight may be allowed to nearest railroad station or steamboat landing.

160 Terms on sales made prior to June 1st, less ten (10) per cent. discount for cash June 10th.

Terms of sales made after June 1st, four months from September 1st, less ten (10) per cent. discount, for cash September 10th.

The licensee may sell harrows at retail to the local users of harrows at — place of business only, but at a price not less than the net schedule prices named.

In witness whereof, the parties hereto have hereunto subscribed their names and affixed their seals this — day of ——, 1892.

THE NATIONAL HARROW COMPANY,
By —— ——, *President.*

(Endorsed:) Ex. 23 or 24. Lever harrow license contract. The National Harrow Co. to —— ——. Dated at Utica, N. Y., 1892.

Such a one was filled up and sent to defendant for signature.

Referring to Plaintiff's Exhibit "Bement's Lever Harrow W. A. M."

the tooth is fastened to the bar by a bolt passing through the cross-bar and the ends of the tooth which overlap the bar. In this harrow the tooth is made rigid on the bar.

Q. Now Plaintiff's Exhibit "Ajax Harrow W. A. M." how is the tooth secured with reference to its being adjusted on the bar?

Objected to as incompetent, immaterial and irrelevant. Objection overruled. Exception to defendant.

A. The tooth in the exhibit referred to is longitudinally adjustable on the bar and is held in position by means of a clip, extending the bearing in the tooth; the parts being held together by a set-screw which admits of the adjustibility of the tooth longitudinally in or out of the ground as may be required.

161 The plaintiff did not license the defendant to build the exhibit referred to. Shortly after the meeting of the executive committee in Auburn in 1892, I prepared and sent to the applicants for lever harrow licenses, blank contracts for assigning their pending applications for patents or assigning any patents they might have as required by the resolution. I sent such blanks to the defendant by registered mail. They have not been executed by defendant. I wrote them in February on the subject of executing these papers.

Q. Please read the letter.

Objected to as incompetent, immaterial and irrelevant. Objection overruled. Exception to defendant.

"AUBURN, N. Y., *February 4th*, 1893.

"E. Bement & Sons, Lansing, Michigan.

"GENTLEMEN: Yours of January 27th, enclosing bill of Mr. Duel properly O K'd by Mr. Bement received. A day or two ago we sent a quantity of notices to the effect that we have commenced suits against both dealer in and manufacturer of infringing harrows and give their names. We trust that for the general information of your customers in regard to our endeavors to protect them against illegal and infringing harrows, you will distribute these notices to your trade without delay. Other suits will be brought against other parties at an early date. You state in your letter that you have mislaid the papers we sent you, we enclose you herewith duplicates of the same both for your firm and the North-Molitor Company, and we trust, you will have them executed without delay. If you have not made applications for patent or if you have not received patents, the printed forms will not at present be or any use to you, but the typewritten copies we ask that you execute

162 and return to us at once in order that your license may be issued.

"Yours very truly,

"W. M. BRINKERHOFF, *Secretary*."

I received an answer to that letter from defendant; I will produce it. The signature to the letter is in the handwriting of A. O. Bement.

Plaintiff offers letter in evidence.
Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

Letter on printed or lithographed letter-heads of E. Bement & Sons. "Lansing, Michigan, February 17, 1893, W. M. Brinkerhoff, Auburn, N. Y. Dear Sir—Your valued favor of the 4th came to hand during my absence from home, and I hasten to reply to the same upon my return. Will you please send immediately an itemized statement of your own expense. We will send the papers, in the North-Molitor and E. Bement & Sons matters as soon as Mr. North gets around to sign the North-Molitor papers. He is absent from home." Last of the letter relates to other matters.

The papers referred to in my letter and in the letter of Bement & Sons to me, are the assignment papers of the patents required by the resolution of the board of directors.

Q. Have you at any time since the writing of that letter requested by letter or by verbal communication, E. Bement & Sons to execute the papers?

Objected to as incompetent, immaterial and irrelevant, and not the best evidence.
Objection overruled. Exception to defendant.

A. I have now before me a letter which I wrote March 29, 1892.

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

163 "AUBURN, N. Y., *March* 29, 1893.

"Messrs. E. Bement & Sons, Lansing, Michigan.

"GENTLEMEN: Last November in compliance with a resolution passed by the board of directors of this company, three papers were sent you, one for transferring patents already issued, another for transferring all pending applications, and another, an agreement, to assign all patents or pending applications, etc., etc. None of these papers have been returned by you as requested. Your license to manufacture lever harrows is held, awaiting your execution of the papers above referred to. This matter must be attended to without delay, in order that these matters may be closed up. It has been thought best, that the applications you may have made or desire to make be placed in the hands of the company to prosecute to patents, owing to the fact that there are a good many lever harrows, and the various parties will undoubtedly apply for patents thereon, and if they are put under one head, it is believed that patents of greater strength can be maintained, than if they are prosecuted by various attorneys and not much attention given to the cases. Would therefore ask that you advise us at once, giving full name or names of those who have or will apply for the patent or patents on your lever harrow.

"Yours very truly,

"W. M. BRINKERHOFF, *Secretary.*"

Not to my recollection did I receive an answer to that letter. That letter was mailed to defendant.

I have now a letter before me which I wrote to defendant.

Q. Will you read it.

Objected to as incompetent, immaterial and irrelevant.

Objection overruled, exception to defendant.

164 "AUBURN, N. Y., *December* 23, 1893.

"Messrs. E. Bement & Sons, Lansing, Michigan.

"GENTLEMEN: Enclosed herewith, you will please find copy of resolutions adopted at different times by this company in connection with lever float spring tooth harrow licenses; also blanks for the transfer of patents issued, and all pending applications and an agreement to assign patents and applications therefor, and to make applications for letters patent on lever float spring tooth harrows. You will also find enclosed duplicate copies of lever harrow license contracts; the agreement to assign and the duplicate license papers bearing date November 29, 1892. This is in accordance with a resolution passed, that all lever harrow licenses should bear the same date. Upon execution of the papers herewith enclosed, as per resolutions, to which your attention is called, and delivery to us of the same, copy of the enclosed license will be executed and returned to you.

"Yours very truly,

"W. M. BRINKERHOFF, *Secretary.*"

Not that I have any recollection did I receive any answer to that letter. I have no recollection that defendant executed the papers for assigning patents or applications or licenses to date. They have not. I believe defendant has never given any notice to the company that they did not intend to execute the papers other than simply not doing it.

I can state more accurately by the minutes of the corporation, who was present at Auburn at the time the executive committee was in session on the subject of lever harrows. They are all named.

Defendant objected as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

165 At Auburn on the 23d day of November, 1892, the following licensees were represented with the committee and examined the harrows on exhibition, viz: A. W. Stevens and Son, C. H. Childs & Company, D. M. Smith & Co., Eureka Mower Company, Childs & Jones, Syracuse Chilled Plow Co. Pitts agricultural works, E. Bement & Sons, D. C. & H. C. Reed & Co., L. C. Lull & Co., Taylor & Henry, William S. Lawrence, Hench & Dromgold.

Q. Will you state what action the executive committee took on the subject of granting licenses?

Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. Motion by Mr. Bement, seconded by Mr. Stevens, that harrow presented by the following-named licensees, viz: A. W. Stevens & Son, Syracuse Chilled Plow Co., E. Bement & Sons, D. C. & H. C. Reed & Co., L. C. Lull & Co., Taylor & Henry, Farmers' Friend Manufacturing Co., D. O. Everest, be licensed, there being no objections to such harrows by any such license-s.

Carried unanimously.

Q. Now in pursuance of that resolution, have all the parties named there, signed and executed their lever harrow licenses, excepting E. Bement & Sons?

Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. With the exception of E. Bement & Sons and L. C. Lull & Co. The licenses are still in force.

I was at the annual meeting held at Jersey City about the 12th of September, 1893, and I attended the meeting of the board of directors immediately following the election at Murray Hill, New York. Arthur O. Bement was present at both these meetings.

Q. Did he at that meeting settle up and pay his royalties
166 on harrows sold in the harrow year, preceding the annual meeting?

Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. He did.

I know who was the first manufacturer of what is termed a practical lever float spring tooth harrow. It was Blaker & Sons of Newtown, Pa. They put such harrow on the market in the season of 1890 and they were subsequently licensed by the plaintiff to build and market their lever float spring tooth harrow.

Paper shown witness. This is the license granted by the New York company to A. Blaker & Sons.

Mr. RISLEY: I offer this in evidence.

Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

License marked "Plaintiff's Ex. 26, S. E. J."

This exhibit is the same as Exhibit 1, printed at page 9 except name of party and the following description of Blaker harrow: A float spring tooth harrow, sectional steel frame, angle bars straight in cross-section in the line of draft with non-adjustable teeth and bars adjustable simultaneously by a lever and with the clips as shown by sample, and is dated October 13, 1891.

Q. Did Blaker & Sons pay a sum of money for the previous sales of harrows sold by them prior to the date of this license, as royalty?

Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. They did.

Q. And is this license in full force at the present time?

167 Objected to as incompetent, immaterial and irrelevant. Objection overruled. Exception to defendant.

A. It is.

Q. Between the date of the meeting in New York in September, 1892, and the meeting of Auburn, in November, 1892, had any of the licensees of the plaintiff offered for sale lever harrows?

A. They had. It was D. B. Smith & Company of Utica.

Q. Had any proceedings been taken against that company prior to the November meeting in 1892?

Objected to as incompetent, immaterial and irrelevant. Objection overruled. Exception to defendant.

A. There had been.

Q. What were the proceedings?

Objected to as incompetent, immaterial and irrelevant. Objection overruled. Exception to defendant.

A. It brought suit and applied for an injunction and served it. The pendency of that suit was reported by me to the executive board meeting, at which Mr. Bement was present. There was a request made by Mr. Smith to have this suit discontinued. He appeared before the committee and requested that the suit be withdrawn and discontinued, which the board refused to do. I mean the executive committee.

Q. Was the suit commenced against anybody for selling a lever harrow aside from Smith, by direction of the executive committee?

Objected to as incompetent, immaterial and irrelevant. Objection overruled. Exception to defendant.

A. There was.

Q. And what was done in relation to the matter?

Same objection as before. Same ruling and exception.

168 A. Suit was brought against Lawrence, Chapin & Company of Kalamazoo, Michigan, which restrained them from marketing or manufacturing the lever float spring tooth harrow.

Mr. COOKINHAM: I object to that and move to strike out the answer. I move to strike the answer of the witness upon the ground that it states the purpose of the suit; that the purpose could not appear except that as it appeared from the papers themselves, and the papers themselves are the best evidence of what the suit was brought for.

The REFEREE: I will deny that request and give you an exception.

The Lawrence, Chapin Company was a licensee of the company at the time this suit was brought in reference to the lever harrow.

Q. What became of that suit finally?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. As I recollect now it was discontinued.

Q. Upon the discontinuance of that suit was a license granted to the company to manufacture and market a lever harrow?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. Granted to the company or else to William S. Lawrence, the sole proprietor and only representative of that company. He was running the business under the name of Lawrence, Chapin & Company.

Q. What is the difference between a float spring tooth harrow and a lever float spring tooth harrow, if there is any?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. It simply consists in the fact that a harrow provided
169 with a lever provides a more ready and convenient method of adjusting the teeth from the old style harrow, in which it was necessary to adjust them separately, independently of each other, by means of a wrench or other tool for loosening the connections or clips which held the tooth in position. I am familar with the designation of harrows having curved teeth in the market among those who deal with them and handle them.

Q. What was understood in the trade as a float spring tooth harrow from '90 to the present time?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. A harrow whose body or frame portion rests during its practical operation upon the ground; the said body portion forming a contract surface with the earth and floats thereon, and being drawn forward by the propelling power. I was at Buffalo at the first meeting of the National Harrow Company of New York, when the subject of license contracts was discussed at which the defendant was represented by A. O. Bement.

Q. What was the discussion upon the subject of the designation of the tools which were to be embodied in the license under the plaintiff's patents, in October, '90? Give the discussion and who participated in it and the conclusion of it.

Objected to as incompetent, immaterial, irrelevant and hearsay.
Objection overruled. Exception to defendant.

A. When the subject of this kind of harrow, in the license contract, was the subject of discussion, at that time, E. Bement & Sons, were manufacturing a wheel harrow; G. B. Olen & Co., licensees of this company, was manufacturing a wheel harrow, D. C. & H. C. Reed was manufacturing a wheel harrow and the phrase "float

spring tooth harrow" was adopted to exclude from the license
170 contract, what was publicly known in the market, as wheel harrows, which our patents did not relate to or cover, and therefore could not be included in our licenses, and after that discussion the words "float spring tooth harrows," was put in the license contract.

Mr. RISLEY:

Q. Who in October '90, of the parties that subsequently became licensees of the company were manufacturing a wheel harrow?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. D. C. & H. C. Reed and Company, E. Bement & Sons, Gale Manufacturing Company, and A. W. Stevens & Son.

Mr. RISLEY:

Q. Did those concerns employ on wheel harrows, curved teeth?

A. They did.

Q. Will you state what was said at that meeting with reference to the designation of the same by which these tools were to be licensed, to those who might thereafter become licensees?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant and hearsay.

Objection overruled. Exception to defendant.

A. The matter was discussed by all the parties interested, and the words "float spring tooth harrows" were adopted for use in the licenses to distinguish the goods which were to be licensed from wheel harrows and wheel cultivators.

Mr. COOKINHAM: I object to that and move to strike out the last part of the answer. I object to his saying it was for the purpose of designating one from the other; that is a conclusion and I mean to strike it out, to distinguish the goods, etc.

171 Objection overruled. Exception to defendant.

Mr. RISLEY:

Q. It was intended to exclude all wheel harrows, other than float?

A. All wheel harrows other than float.

Mr. COOKINHAM: I object to that answer and move to strike it out.

The REFEREE: Can't you agree on that point?

Witness proceeds.

The construction of the wheel harrows which the parties who became licensees were at that time manufacturing were constructed by having the harrow portion of the machine suspended on overhanging axletrees, supported at its ends by wheels. Some of them had tongues and some did not. In such harrows no part of the

frame came in contact with the ground, except the wheels upon which the thing was transported. The wheels were about the size of the front wheels of a carriage and the operator of some of such machines known as "walking cultivators" walks behind the machine.

Mr. RISLEY:

Q. In short, the distinction between the float harrow and the wheel harrow is one, where the working portions of the harrow are supported on wheels and do not come in contact with the ground, and in the other, where the harrow in its operation comes in contact with the ground.

Mr. COOKINHAM: That I object to as incompetent and immaterial.
Objection overruled. Exception to defendant.

A. That is a very clear description of the differences of such machines, and is in point of fact, the difference between a float and a wheel harrow.

I object to that as before.
Same ruling and exception.

Mr. RISLEY:

172 Q. Have you the resolution here adopted at the Buffalo meeting, with reference to the words "float spring tooth harrow" where action was taken on it?

A. I have. September 1, 1890.

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and hearsay.
Objection overruled. Exception to defendant.
Mr. RISLEY: Read the resolution.

(Witness reads.) Resolution offered by Mr. Stevens. "Resolved, that in assigning patents to this company by any member thereof, the assignor shall not be deprived from using said patent in the construction of any implement other than float spring tooth harrows, and as to such implements he shall have the same right to use the patent, as if the same had not been assigned, and in case any such patent or patents shall be infringed by any one, by the construction of any implement other than float spring tooth harrows, then the assignor of such patent or patents to the National Harrow Company, shall have the right to bring suit against such infringer or infringers in the name of the National Harrow Company."

Mr. BRINKERHOFF recalled.

Mr. RISLEY:

Q. Referring to the letter of February 4, 1893, to the defendant, who had you referred to when speaking of the persons against whom suits had been brought on harrows?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. D. M. Osborne & Co. and the harrow manufactured by them.

173 The price mentioned in the license of the lever harrows is the price at which harrows were to be sold are the same as adopted at the meeting of the executive committee in Auburn, N. Y., 1892.

Q. Is the plaintiff ready and willing on its part to perform the conditions embraced in license contracts, 1 and 2.

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. It is.

Q. Is there a lever harrow in court here, duplicate of which was manufactured by A. Blaker & Son, Newtown, Pa., in '902?

A. There is.

Same produced and marked in evidence Pl'ff's Ex. "Blaker Lever Harrow."

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

There is here a harrow which was manufactured by the Walker Manufacturing Company of Moravia, N. Y., and licensed by the plaintiff.

Harrow offered in evidence as an exhibit and marked "Pl'ff's Ex. Walker Harrow."

This harrow has two runners which forms a part of the frame of the harrow so that when the harrow is drawn the runners run in the same line of the draft; run in contact with the ground in the same line of draft.

Q. Was defendant's president present when that harrow was licensed to the Walker Manufacturing Company?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. He was. The license covering that harrow is still in force. There is a section of defendant's harrow called a "horseshoe harrow" in court.

174 Q. Was that harrow licensed to the Farmer's Friend Manufacturing Company of Dayton, Ohio, by the plaintiff's predecessor?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. It was.

Q. Was Arthur O. Bement a member of the board and was he present voting when they voted to license it?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception to defendant.

A. He was.

Q. Is that license still in force?

Objected to as before.
Same ruling and exceptions.
Harrow marked "Pl'ff's Ex. Horseshoe Harrow" offered in evidence.
Same objection, ruling and exception.

Since September, 1893, I have had occasion to look up and ascertain the names of parties who had in their possession on sale defendant's Ajax lever harrows.

Q. Have you from that investigation ascertained from different places that these harrows were being sold in the public market; designate the places where you have seen them from time to time since the time stated in the question?

Objected to as incompetent, immaterial and irrelevant and on the ground that such harrows are not covered by the license.
Objection overruled. Exception to defendant.

A. I have found them in the possession of Mr. Wilhelm of Meyertown, Pa., also in the possession of Coleman and Horton, Nichols, N. Y., W. E. Wait, Atlanta, N. Y., and Hiram Ellis of Arkport, N. Y.

175 I have found in the possession of some one or more of these parties what is designated in the license contract the "Steel King" harrow.

Q. What experience, Mr. Brinkerhoff, have you had in mechanical structure and in interpreting and construing patents granted by the Government of the United States, and in your answer to this question, please state generally your experience and opportunity of familiarizing yourself with patented or patentable inventions?

A. I have had general charge for upwards of fifteen years of the patent business of several manufacturing companies, including the construction of machines that were patented and the construction of machines in accordance with patents issued, giving of expert testimony on patented construction of various machines, more particularly in the line of farm machinery, and especially in that branch of farm machinery known as spring tooth harrows.

Q. And have you prepared specification and examined drawings and given opinions in that regard; if so, what experience in that line?

A. In farm machinery line, I have examined upwards of five thousand copies of patents, having in view the machines manufactured under such patents of various constructions, and many times have been called upon for, and have written opinions as to infringement of patents, and as to the validity and invalidity of the same.

Q. Have you yourself been an inventor and procured patents from the United States Patent Office?

A. I have.

Q. About how many?

A. I should say about one hundred.

"Q. Are you familiar with what is known as the Reed patent (No. 201,964)?

A. I am.

Q. Are you familiar with the first claim of that patent?

A. I am.

Q. Are the elements set forth in claim 1 of that patent embraced in the construction of the Plaintiff's 'Exhibit Ajax Harrows'?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant, and further that the question of the infringement or validity of a patent, cannot be questioned in a State court.

Question withdrawn."

[Matter enclosed between rules printed on a slip facing page 175.]

LEROY W. STEVENS, a witness called and sworn for the plaintiff, examined by Mr. Risley, testified as follows:

I am 45 and a manufacturer; am one of the firm of A. W.
176 Stevens & Son. I was a director of the National Harrow Company of New York and of New Jersey, from the organization to the conclusion of both companies practically, and was up to September, 1893, a member of the executive committee, of the board of directors. I think I went out of the executive office at election of 1893; of course, I can't place it without the records.

I was at the meeting in Buffalo at the organization of the company, in the fall of '90. Arthur O. Bement was there to my best recollection. I recollect at that meeting, of the subject of what harrows were to be licensed, were to be designated in the license contracts—what name was to be applied to them.

Q. Please state what term was decided on at that meeting?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. Float spring tooth harrows.

Mr. RISLEY:

Q. Were any of the parties who became licensees of the company, then building what is known in the trade as a wheel harrow or wheel cultivator?

A. They were. I have been a dealer and manufacturer of harrows, having curved teeth since '87; that was the first year of our patents.

Q. What do you understand by the term "float spring tooth harrows," and what is understood in the trade by that designation?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant. Improper.

The REFEREE: I think the last part of it is all right; what is understood in the trade by the term.

Exception.

177 A. A harrow that is so constructed, that its frame or parts connected to the frame, floats or comes in contact with the earth.

Mr. RISLEY:

Q. And what do you understand in the market by the term wheel cultivator or wheel harrow?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant. It makes no difference what is known as a wheel cultivator.

Objection overruled. Exception to defendant.

A. A harrow or cultivator so constructed that its frame supports the harrow or cultivator teeth, which is suspended above the earth and does not come in contact and runs on wheels.

Mr. RISLEY:

Q. Looking at exhibit, P'lff's Ex. "Ajax" Harrow is that a tool that would be called in the public market and known as a float harrow.

Mr. COOKINHAM: I object to that as incompetent, immaterial irrelevant and improper and that the witness cannot answer in that way, even if he is an expert.

The REFEREE: I think he may answer.

Exception.

A. Yes, I should call it that. The function which the lever performs is simply for the adjustment of the tooth which is more readily and easily done by the lever than the old principle of independently securing them. The annual meeting of the board at Murray Hill hotel in September, 1892, when the subject of lever harrows was under consideration the question was discussed there.

My best recollection is that Arthur O. Bement was present at that meeting.

I think prior to that meeting D. M. Osborne & Company were then marketing a lever harrow.

178 I remember I was at the meeting, which was held at the Murray Hill hotel, in September, 1893. I think I recall a statement made there at that time by the licensees that were present, including the directors, on the subject of the proportion of lever harrows which had been manufactured and sold in the year prior to that meeting.

I remember it was talked about, the general conversation. I was present at Auburn when the executive com- met in 1892, to grant licenses on lever harrows. Mr. Bement was present during that entire session, and participated in the action of the board very largely. And that is a fact, in all the meetings of the board, Mr. Bement took a leading part, in all the deliberations of the company to the time he went out of it.

Prior to the 17th day of June, 1891, no one had any stock in the National Harrow Company; the day of arbitration. I can't say as

to whether the company had been organized for nearly a year or not; some months I think. I can't say as to whether there had been other licenses agreed upon prior to these that are here designated as Exhibits 1 and 2. I do not remember that there had been a previous license signed and left in the hands of either Mr. Norris or Mr. Risley.

I remember the suit that the Chilled Plow Company of Elmira brought against the National Harrow Company.

I remember that after the decision of Judge Smith in the case of the Chilled Plow Company against the National Harrow Company we agreed to cancel the agreements then in existence between these licensees and the National Harrow Company.

I have no way of fixing dates as to whether it was before license contracts one and two were formulated. I- may be; I don't swear to anything definitely as to whether contracts one and two were signed by anyone until after we had agreed to cancel the papers that Judge Smith had declared void.

179 I remember the fact that Judge Smith did declare certain contracts between the National Harrow Company and the licensees to be invalid. Something to that effect I believe. I suppose the papers between the Chilled Plow Company of Elmira, and the National Harrow Company, were the same as those between other licensees and the National Harrow Company. And I think those were the papers in that suit which Judge Smith ordered delivered up to be cancelled on the ground that they were in restraint of trade, at least that they were void. Subsequent to that time, the licensees and the directors of the National Harrow Company made an arrangement by which all those papers like those that Judge Smith had passed on should be cancelled, and they were cancelled according to my recollection. All the licenses to the licensees were in the same form.

I had some part in getting the Syracuse Chilled Plow Company into the National Harrow Company. I think the books show when it was.

Mr. RISLEY: I will concede the fact that the Pitts agricultural works signed the contract on the 2d day of September, 1891.

I don't think I could name all the manufacturers of spring tooth harrows in the United States at the time of the arbitration, in June, 1891, but there were D. C. & H. C. Reed, Taylor & Henry; Lawrence & Chapin & Company; Lull & Company; Everest & Company; E. Bement & Sons; I think the Gale Manufacturing Company. I am not certain as to that. Pitts agricultural works; the Syracuse Chilled Plow Company; Eureka Mower Company; C. H. Childs & Company; Childs & Jones. I think D. B. Smith & Company. Farmers' Friend. I am not positive; Farmers' Friend. I think. And I think Blaker, Hench & Dromgold, A. W. Stevens & Son, and there might be a few others; Walker & Company,

180 and Sweet & Company. There were twenty or twenty-one.

Q. And the National Harrow Company up to that time

had never done anything except to organize and sign these contracts, had it and held meetings of its directors?

A. I couldn't answer that Mr. Cookinham without looking over the records; there was a great deal done; some I remember and a great deal I have forgotten.

When Exhibits 1, 2, 3, 4 and 5 had been signed by all those that did sign them, it constituted the manufacturers of all the spring tooth harrows in the United States at that time, except the Chilled Plow Company of Elmira and Blaker. I can't say definitely that that was the contract I signed. I can't say as to whether I have ever seen any other form of license that was signed by anybody in 1891, except like Exhibits 1 and 2, etc. I am trying to myself understood; I can't answer definitely that these licenses are the same as I signed; I can't say whether the licenses Exhibits 1 and 2 are just the same in all respects as the license signed by me and others who took licenses in the National Harrow Company.

The licenses signed in '91 between the National Harrow Company and its licensees were the same in form with exception of the party with whom it was made, and also the description of the harrow, that was to be made by the particular licensee.

I have seen harrows illustrated that had a small wheel that carried the frame.

Mr. COOKINHAM: Concedes that all papers that were held in escrow on the 16th day of June, 1891, were delivered by authority of the board of directors.

The papers were in fact physically delivered on the 17th day of June, 1891.

181 The arbitrators on or after the 17th day of June, proceeded with the arbitration, and made an award prior to the first day of July. I have that award but not here; the arbitration was concluded and an award made.

It is conceded by the parties that stock was issued to all the licensees in accordance with the award.

Q. Afterwards did the defendant's firm object to the sufficiency of the award, do you know Mr. Brinkerhoff?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception to defendant.

A. It did.

Q. Did you in November '91 settle that question with the defendant?

A. I did.

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

The REFEREE: There was some adjustment made of it?

A. Yes sir.

Mr. RISLEY:

Q. Did you hold the paper and give direction with reference to it?

—. ——.

Q. In whose handwriting?

A. Arthur O. Bement's.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Offered in evidence and marked "Plaintiff's Ex. 27, S. E. J." and is as follows:

To the National Harrow Company, Utica, N. Y.:

The National Harrow Company, in accordance with a contract this day entered into, agreed to issue upon our request, stock of said company to the extent of sixteen thousand dollars to our order.

You will please issue said stock in the name of Arthur O.
182 Bement and mail same to him at Lansing, Mich., without unnecessary delay.

E. BEMENT & SONS,
By A. O. BEMENT, *Pres.*

Nov. 17, 1891.

Received above stock, share No. 47, 160 shares this 23rd day of Nov., 1891.

E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

The stock mentioned in this last exhibit was issued and delivered to Mr. Arthur O. Bement as indicated in the receipt attached to the paper. So far as I know he holds it.

The stock on the award and the additional stock was issued to Arthur O. Bement.

It is conceded that the witness, Robert E. King whose evidence is not printed in full in this record, testified that between February 28, 1893, and the commencement of this suit, he purchased from the defendant and the defendant sold and delivered to him, five "Steel King" harrows, at less prices and on more favorable terms of payment than those fixed in the license contract and that Mr. King afterwards paid for said harrows at a reduced price.

[Matter enclosed between rules printed on a slip facing page 182.]

CHARLES H. CHILDS, recalled.

I was at the meeting at Buffalo in the fall of '90, when the subject of the licenses to be granted by the National Harrow Company of New York was the subject of discussion by the board of directors. Arthur O. Bement was one of the parties present and participated in the discussion. I have some recollection of what was said in the

discussion on this subject of designating the terms by which those tools were to be described in the license contracts.

Q. Was there anything said in that discussion with reference to what was known in the trade as wheel harrows?

Objected to as incompetent, immaterial, irrelevant and hearsay. Objection overruled. Exception.

A. There was.

Q. Were any of the parties present participating in that
183 discussion, who stated that they were then manufacturing what was known in the trade as a wheel harrow?

Same objection, ruling and exception.

A. There was.

Q. State who they were as you now remember them.

A. D. C. & H. C. Reed, E. Bement & Sons, I think Lawrence, Chapin Company, also Stevens & Son.

Q. Was the subject of excluding wheel harrows discussed and acted upon by the directors of the company then present?

A. I do not quite recollect; it was discussed and some action taken on it. I have been engaged in the sale of agricultural tools especially spring tooth harrows upwards of ten years. I think my old firm with the exception of two others was the first in this business. D. C. & H. C. Reed Company were the first, and G. B. Olin & Company followed. J. M. Childs & Company handled the Perry spring tooth harrow in certain territory of the United States, shortly after Olin & Company began to manufacture and continued in that business as long as the firm of J. M. Childs & Company was in existence. They continued to handle the Perry harrow until they commenced to manufacture harrows of their own make and that was in 1887. Now, during these years the term "float spring tooth harrow" has been applied to harrows employing curved teeth, as a designation from other harrows that do not use such teeth. What is known as a float harrow is a harrow when in operation the frame comes more or less in contact with the ground, according to the condition of the soil.

Q. What would a harrow be termed that had an ordinary frame with curved teeth attached to it, where portions of the frame run, when in operation, in contact with the ground? What designation would you apply to such a harrow as that?

184 Objected to as incompetent, immaterial and irrelevant. Objection overruled, exception.

A. A float harrow with curved teeth.

Q. Would or would not a classification of a harrow by the term "float" be changed as understood by the trade, by applying a shoe made adjustable to relieve the pressure of the frame on the ground when the harrow is operated?

Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and improper and an expert witness cannot be interrogated in that manner.

REFEREE: I don't think the question calls for an expert opinion, it calls simply for what is understood in the trade.

Objection overruled. Exception.

A. A wheel harrow where the frame is suspended from the axles upon which the wheels are mounted, so that the frame to which the teeth are attached is some distance from the ground. Neither the frame or the tooth supports on such a device comes in contact with the ground in operation. A float spring tooth harrow is made with the curved spring teeth attached to the frame; the larger portion of the teeth being above the frame, so that when the harrow is in practical operation, the frame comes more or less in contact with the ground, according to the condition of the soil. I had seen the wheel harrows or cultivators which the parties were manufacturing who became licensees of the National Harrow Company of New York. The wheels of such implements I should say, were about four feet in diameter; they were mounted on axles or an axle to which the frame, upon which the teeth were mounted or frames, were suspended. I mean by "frames" that in some of those wheel harrows there were three sections of teeth, so that the center section could be removed and the imple-
185 ment then used as a cultivator, and when it was desired to use the implement as a harrow for pulverizing or preparing the soil for crops, the centre adjustment could be put in place. The frame or frame parts to which the teeth are attached I should say would be some 18 inches above the ground, and in what is known in the trade as a wheel harrow, the frame to which the teeth are attached under no circumstances comes in contact with the ground. The frame to which the teeth are attached is carried by the axle upon the wheels, which it runs on, on the ground.

Q. And do you remember whether in that line of tools the teeth are adjustable in raising or lowering them, by any mechanical device?

Mr. COOKINHAM: That I object to as incompetent and immaterial.

Objection overruled. Exception.

A. On some of these wheel harrows, which I have seen, the frames to which the teeth are attached are adjustable by means of chains and levers; the levers being attached to the axle, so that by moving the lever, the teeth were elevated, but I don't see how they could be depressed. If they were elevated and you moved the lever they would drop back again in contact with the ground. The spring teeth used on these wheel harrows I should say were about two feet long. I do not mean the entire curved length; I mean the length of the teeth from the butt to the point on the wheel harrow that was perhaps three feet. I think the teeth to that line of harrows are fastened rigidly to the frame and supported in the manner which I have designated. There is no adjustment of the teeth in reference to the frame. I think the adjustment is secured by the lever and its connection with the frame to which the teeth are attached. I am

acquainted with substantially all of the spring tooth harrows
186 that are being marketed at the present time in the United States. So far as I know all of the harrows that are being manufactured and marketed, embodying curved teeth whether lever or non-lever, the frames in some portion of the working soil come in contact with the ground, so far as I know with the exception of wheel harrows such as I have described.

Q. I now show you a cut and inquire whether that illustrates the principle of the construction of what is regarded in the trade and by yourself as a wheel harrow or cultivator?

Mr. COOKINHAM: I object to the question as incompetent, immaterial, irrelevant and improper.

The REFEREE: I think he may state whether that is an illustration or cut of what he understands to be a wheel harrow.

Exception.

A. I do understand this to represent a wheel cultivator and a wheel harrow as I understand it, it would be made wider, admitting of another section. The cut also illustrates what is termed as the gang of the teeth which can be removed from the wheel harrow and make it a wheel cultivator. The cut shown me illustrates the general location of the frame bars to which the teeth are attached, in what I term a wheel harrow, in a general way, but there are other styles where the teeth are attached in a somewhat different way, with reference to the frame bar to which the teeth are attached in the cut, that cut illustrates generally the location of the frame to which the teeth are attached in wheel harrows. I offer the cut on page 83 of the catalogue, supposed to be the catalogue of E. Bement & Sons, and ask to have it marked.

Marked Pl'ff's Ex. 39, S. E. J.

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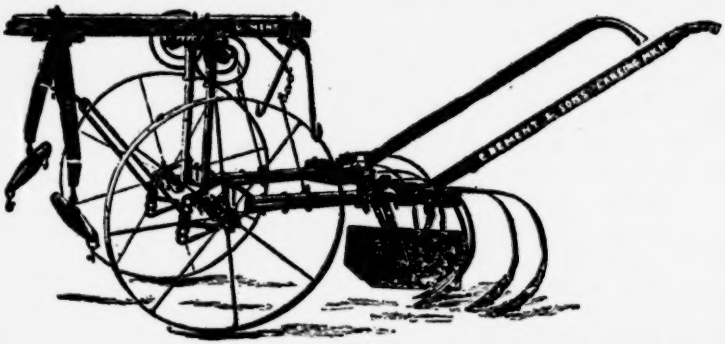


I was present at the meeting of the directors of the plaintiff at the Murray Hill hotel in September, 1892. Prior to that meeting and in that year D. M. Osborne & Co. were manufacturing and marketing lever float spring tooth harrows. At the meeting of the directors

at the time mentioned, the subject of the right of the licensees of the plaintiff to build lever harrows under their then existing licenses was discussed by the board of directors. I think Charles H. Duel of Syracuse was present at that meeting.

Q. Was the subject of granting licenses to build lever harrows discussed by the board of directors at that meeting?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

The REFEREE: I will receive the fact that it was discussed.

Exception.

A. It was. I and A. O. Bement were members of a committee together with Mr. Duel to consider the subject of what the licensees should do with reference to the sale of lever harrows, until
188 the licenses had been granted which would permit them to build. Mr. Duel at that time was the legal adviser of the corporation with reference to its business matters and especially in reference to patents owned by the company. He is a patent attorney, doing business at Syracuse. I remember of Mr. Duel stating to the board of directors his views with reference to the right of the licensees of the company, under the then existing licenses to build lever harrows, without having a further license granted by the company.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

The REFEREE: I think the fact that he expressed himself on the subject there is competent, but do not think, what he said, I will receive.

Exception.

I remember he had something to say on the subject. There was a discussion at that meeting by the various licensees, including the directors, officers, and individuals with reference to the rights of the then existing licensees to build lever harrows, without first obtaining the license from the company.

Q. And after all that discussion did Mr. Bement offer a resolution, which was voted on by the directors of the company?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant and hearsay.

Objection overruled. Exception.

A. I don't fully remember whether Mr. Bement was the person who formed and offered a resolution, but there was a resolution of that kind offered and voted for and adopted. I met with other members of the executive committee at the corporation at Auburn in the fall of November, '92. Mr. Bement was present at that meeting and participated in the proceedings that were had there. At that meeting I recollect that De Wane B. Smith of the firm
189 of D. B. Smith & Co. made a statement, with reference to his having been sued and enjoined from building a lever harrow

in which he requested that some action be taken with reference to the disposition of that suit.

The question of discontinuing or continuing the suit, was voted on there I think, and as I recollect it, it was continued. It has never been discontinued by the action of the board to my knowledge.

At this meeting at Auburn all the licensees, including the defendant, were invited to be present with their harrows which they desired to be licensed. The meeting of the committee was with the licensees.

Q. Now who represented the defendant or claimed to represent the defendant at that meeting as a licensee of the company?

A. Mr. A. O. Bement.

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

He there produced a section of a harrow which he requested that his firm be licensed to build.

Q. State what was said on the subject of his firm being licensed to build that harrow.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. I don't remember exactly what he said, but in substance he desired to have a license granted to his company to manufacture that style of lever float harrow.

The executive board with Mr. Reed added, acted on the subject.

Q. Did the plaintiff at any time to your knowledge vote to license the defendant to build harrows like Plaintiff's Ex. "Ajax" Harrow W. A. M.?

Same objection, ruling and exception.

A. It never has to my knowledge.

190 Q. Were licenses granted and delivered to other parties by the plaintiff to build lever harrows immediately following that meeting at Auburn?

Mr. COOKINHAM: I object to that as immaterial.

Objection overruled. Exception.

A. There were licenses granted.

A. Will you state Mr. Childs in your own way what parties that you now remember were licensed by the company to build lever harrows, where the teeth were made attached to the bars so as to be longitudinally adjusted on the bars?

Mr. COOKINHAM: Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. W. S. Lawrence, D. C. & H. C. Reed Company, Taylor & Henry, Farmers' Friend Manufacturing Company, Eureka Mower Company. That is all I think of.

Q. Now were there licenses granted to other of the licensees to build lever harrows where the teeth were supported in a way to be longitudinally adjusted in the harrows, where the teeth were not mounted on the bar itself?

Mr. COOKINHAM: I object to that.
Objection overruled. Exception.

A. They were mounted on the frame.
Q. I mean on the bar?
A. Some harrows didn't have what you would term a bar.
Q. What about the teeth being longitudinally adjusted in the harrows other than the harrows which had the teeth mounted adjustably on the bar?
A. There are other styles of lever harrows where the teeth attached to the frame are so that they could be longitudinally adjusted, upon which licenses were granted.

Q. Was there any lever harrows licensed at that time to
191 any one where the lever adjustment raised and lowered the frame itself by means of a shoe or lever coming in contact with the ground?

Mr. COOKINHAM: I object to that the same as before.
Objection overruled. Exception.

A. There were. I recollect one. That was a lever harrow which was licensed to the Farmers' Friend Manufacturing Company.
Q. Did that lever attachment and the shoe change the construction of their harrow which had theretofore been licensed in any particular?

Objected to as incompetent, immaterial and irrelevant.
The REFEREE: I think it is proper to show the construction of the implement was substantially the same as before with those additions.
Objection overruled. Exception.

A. It did not, with the exception of the lever and shoe attachment.

Attention of the witness is called to Exhibit "Horseshoe Harrow, W. A. M."

This exhibit shows the plain harrow of the Farmers' Friend, to which they attached the lever and shoe, upon which they were licensed.

The office of the lever attachment and the shoe which I have referred to in my previous answer, is that there are two cross-bars attached to the main frame or draft bars of each section, and a steel shoe attached to each cross-bar; the cross-bar being mounted above the frame bar so that it would roll in its bearings; there was another bar running lengthwise attached to the two cross-bars, and a lever attached to the section running lengthwise, so that by pushing forward or drawing back the lever, the shoe would be raised or lowered to adjust the depth of the cut of the teeth; it could be elevated
192 so that the frame and teeth would not rest on the ground, but be carried by the shoes.

When the harrow was in operation in harrowing the soil the frame would come in contact with the ground according to the condition of the soil. If there is a hard soil, the shoes and the teeth might carry the harrow frame out of contact with the ground.

Q. Are the harrows which the company has licensed others to build, having lever attachments so constructed, that the teeth can be drawn out of contact with the soil by movement of the lever?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception.

A. So far as I can see, they are all made so that the teeth can be raised free from the ground, while the harrow is in motion. The teeth will be free from the ground while the harrow is being drawn.

Q. And are all these lever harrows so constructed that the depth of the cut of the working points of the teeth can be regulated by the lever attachments?

Mr. COOKINHAM: Same objection, ruling and exception.

A. They are so far as I know of. After the decision of Judge Smith of Elmira, with reference to the licenses which had been granted, prior to the time of granting of the licenses in suit, I have some recollection of a meeting of the licensees held in Utica, when the form of the license contracts was submitted to the meeting. I think it was held in the office of Risley & Perry, in Utica. I think Mr. Arthur O. Bement was present at that meeting. I think a draft of the license contracts "A" & "B" which are the regular licenses of the company was submitted for the approval of those persons. The lawyers that were present at that meeting and submitted a
193 draft of it were Mr. Stewart of Kalamazoo, Mr. Risley and I think Mr. Duel, and I think also Mr. Quin.

Q. Was any statement made by either of these attorneys as to these license contracts which were signed, as to the same having been drawn within the rights, which the company owned by virtue of the patents, or anything on that subject?

Objected to as irrelevant and hearsay.
Objection overruled. Exception.

A. There was. I think the draft of the license contract was read to the licensees at that time.

Q. Did they take action on the subject of the draft?

Same objection.
Objection overruled. Exception.

A. They did as I remember it. The draft was afterwards printed. It is possible there were a few changes made. I don't remember, and then printed. I produce here and have with me the catalogue of J. M. Childs & Co. printed in the year '84. There is a wheel harrow illustrated in that catalogue employing spring teeth. This is the cut.

Q. And who manufactured those illustrated in these cuts?

Mr. COOKINHAM: I think I better object to that as incompetent immaterial and irrelevant, and too remote.

Objection overruled. Exception.

A. I think G. B. Olin & Company.

Plaintiff offers in evidence page 19 of the catalogue before referred to.

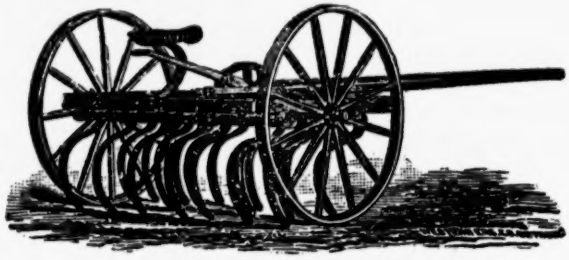
Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

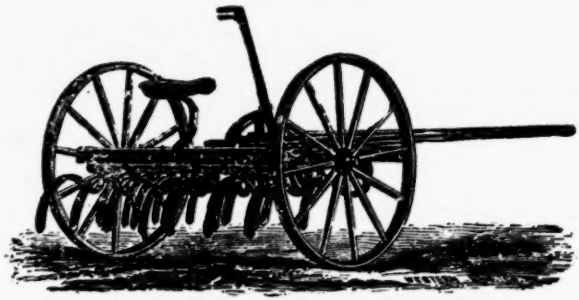
REFEREE: I will receive it as an illustration of cut of the machine he speaks of.

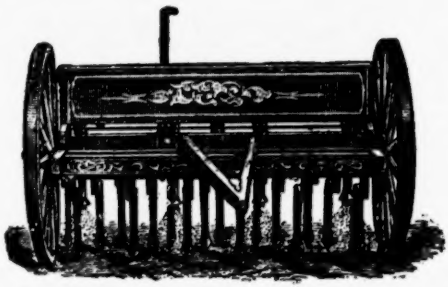
Exception.

Marked Pl'ff's Ex. "40 S. E. J."

194







At the time the license contracts in suit was made, or just prior thereto, I am not sure whether or not G. B. Olin & Company still manufactured those wheel harrows. We had not been sell-
195 ing G. B. Olin & Company's goods for several years previous, but when we did last handle them, that was the style of wheel harrow they were manufacturing, I now remember it. I think D. C. and H. C. Reed & Company were manufacturing a similar wheel harrow as illustrated in Ex. 40, but my impression is, from their harrow, the teeth were in three sections, although I am not sure.

Q. Mr. Childs, what was the number of harrows which all of the licensees of this company sold and reported and paid royalties on up to August 1st, 1893, for the year previous to that time?

Objected to as incompetent, immaterial and irrelevant.
Objection overruled. Exception.

A. I think about 50,000 harrows; probably it would vary a little, one way or the other.

Q. Now, give us the number of harrows which were sold by the licensees of this company in the year ending August 1st, 1894, that have been reported or on which royalties have been paid or in process of adjustment outside of defendant and the North-Molitor Company.

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.
Objection overruled. Exception.

A. I could hardly give the figures, without referring to the books; there are quite a number that have not been reported. I should say between twenty and twenty-five thousand.

Q. About what proportion of the spring tooth harrows in the United States that are being marketed, are marketed under the license of the National Harrow Company, assuming that Bement & Sons and the North-Molitor Company are still licensees of this company and that their harrows are subject to the license contracts?

A. I should think over ninety per cent. There are some
196 parties who are selling a few harrows who are not licensees of this company. I remember there was some discussion at the meeting in 1893 in reference to the proportion of lever harrows sold to all others, but I do not remember just the percentage of each kind of harrows that may have been sold. I was familiar with the spring tooth harrow trade during the year ending August first, 1893.

Q. Now what proportion of the harrows in your judgment were lever harrows that were sold during that year?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and speculative.
Objection overruled. Exception.

A. I should say about 75 per cent.

Q. Now between the years '93–'4, did the sale of lever harrows

increase or decrease in proportion to the non-lever harrows which were sold?

Same objection, ruling and exception.

A. I think the sales bore about the same percentages, but if anything, would think that the sales increased on the lever style.

Cross-examination.

By Mr. COOKINHAM:

The officers and directors of the National Harrow Co. are: Mr. Risley is the president, Mr. Manning of the Syracuse Plow Company is one of the vice-presidents, Mr. George S. Dana is vice-president, Mr. Charles H. Childs treasurer, and W. M. Brinkerhoff secretary. All of them are directors except Mr. Brinkerhoff. The other directors are A. O. Bement, W. A. Dromgold, C. W. Griner of Buffalo, H. C. Reed, L. C. Lull, F. J. Henry, H. B. Taylor of Newark, N. J., L. W. Stevens, W. A. Scott. The number of directors is thirteen.

The condition of the financial world has something to do with the sale of harrows, also the condition of the season has something to do with it, possibly a little.

197 The sale of harrows in '94, that is up to August '94, was less than it was for the year ending August '93. The reason was, I think, somewhat on account of the unsatisfactory condition of general business and some trouble caused by the licensees of the company. I think dry weather would affect it somewhat.

I presume there were other spring harrows and cultivators made and sold in the country besides those made by the manufacturers, who became licensees of the National Harrow Company in '91.

I mean that a wheel harrow is one in which the frame under all ordinary circumstances would not touch the ground.

I have never seen harrows, that I should think, would be naturally called wheel harrows, where the wheels were smaller then, well, I should say three feet in diameter, perhaps a little less. That would bring the axle a foot and a half from the ground.

Q. Now suppose runners were placed upon the harrow that would carry the frame a foot and a half from the ground under all ordinary circumstances, what kind of a harrow would you call it?

A. I have never seen a harrow of anything like that construction.

Q. Would you call it a float spring tooth harrow?

A. I don't know what to say, as I have never seen a harrow of that kind and don't quite myself see how a practical harrow could be made in that way.

Q. Well, what would you call it if there was one constructed in that way?

A. I would want to see the harrow before naming it.

Q. Would you call such a harrow as that a float spring tooth harrow?

A. I don't know.

Q. Why don't you know?

A. I don't know exactly how it would appear when made
198 or the way in which it would work in the ground.

Q. Well, assuming that the Plaintiff's Exhibit "Ajax" harrow was so arranged that the frame could be carried free from the ground under all ordinary circumstances, by a shoe that rested upon the ground and by the lever, the teeth could be so adjusted as to go into the ground or lifted out at the option of the operator and that the harrow did successfully work, would that be a float spring tooth harrow in your judgment?

A. As a harrow of that construction would drag on the shoes, I would call it a sort of half-breed float harrow.

Q. Would you call it a float harrow?

A. I think I would.

Q. Why would you call it a float spring tooth harrow?

A. Because the shoes attached to the frame would necessarily drag or float over the ground.

Q. Then the size of the wheel would have nothing to do with it as to whether it was a wheel harrow or a float harrow?

A. I think that would have something to do with it also.

The size of the wheel would have something to do with it as to whether it was a wheel harrow or a float harrow.

I stated a few minutes ago the wheel should be probably about three feet in diameter to induce me to call it a wheel harrow. I couldn't say without seeing the harrow after it was constructed if the wheel was two feet.

I should say a wheel harrow must necessarily have wheels and axles or an axle to which the frame, upon which the teeth were attached is in some manner suspended.

199 Q. Well then no matter what the size of the wheels were you would call it a wheel harrow?

A. I might not.

Q. Then your definition is not good, is it?

A. I can only define what I have seen in the way of harrows of this description.

Q. Now I ask you to define what is called a wheel harrow, then I ask if the size of the wheels have anything to do with it?

A. I might see some new construction which I have never seen and if produced might make a difference in my understanding.

Q. Then if the wheels were very small and yet the frame was carried under all ordinary circumstances by being suspended from the axle between the wheels, it would be a wheel harrow?

A. It might not.

Q. Why not?

A. The frame might at the same time come as much, or more in contact with the ground or soil, according to its condition, and in that case I should hardly think it could be termed a wheel harrow.

There were a large number of lever harrows exhibited at the meeting in Auburn in November, '92. There were lever harrows exhibited by A. W. Stevens & Son; Farmers' Friend Manufacturing Company; D. C. & H. C. Reed Company; Taylor & Henry; E. Bement & Sons, W. S. Lawrence, I think L. C. Lull, Hench & Drom-

gold, Pitts Agricultural Works, Charles H. Childs & Co., and I think Childs and Jones, also Syracuse Plow Company.

I know quite a number had been invented some time previous to the September before. One of C. H. Childs & Co., I don't think at that time any of the licensees except Blaker had manufactured or put in any lever harrows. He was the only licensee of our
200 company who had made and sold a lever harrow. He took his license I think in '91.

I think he had made quite a number and sold them through his section of the country. I think there was a lump-sum royalty agreed upon, and that was paid by Blaker and Company at the time they accepted their license to cover back royalties for harrows sold previous to the granting of their license. I don't remember what that was. I should say there was less than a thousand the next year.

At the time the meeting was held in New York in September '92, and the committee of myself, Mr. Duel and Mr. Bement was appointed, the subject of the D. M. Osborne & Company selling a lever harrow was discussed I think. The whole matter of lever harrows was referred to this committee, after quite a full discussion and after being talked over by all the licensees and members of the company. D. M. Osborne at that time was not a licensee, but became a licensee some time in the fall of '92. The form of the licenses were all the same, I think, with the exception of D. M. Osborne & Company's license. I think it is in the hands of the secretary of the company. I think the term, float spring tooth harrow, was talked about at the meeting held in Buffalo in the fall of '90.

Q. You remember there was a paper that was called a preliminary agreement that was sent around and signed, agreeing to form the National Harrow Company and agreeing to go into this arrangement.

A. Yes I think there was some preliminary paper signed. I think I have none of those papers, either individually, or for Childs & Company or the National Harrow Company.

Whether that meeting in October '90 was a meeting of the directors of the National Harrow Company or a meeting of the
201 parties, who went into the arrangement I don't quite remember, but my impression is that it was a meeting of the parties who agreed to go into the arrangement.

My recollection is that the following parties at that time held licenses under the Reed patent. Taylor & Henry, Lawrence & Chapin, A. W. Stevens & Son, J. M. Childs & Co. D. C. & H. C. Reed and G. B. Olin Co., owned the patent at that time as applied to separate territories. And they all manufactured and sold under the patent. There had been a large amount of litigation over that patent. I think the Clipper harrow then made by E. Bement & Sons, had been enjoined under that patent, also a harrow manufactured by the Eureka Mower Company of Utica. I have some recollection that in the case against the Eureka Mower Company a hearing a short time before this had been had at Cincinnati, I think it must have been before.

I think Mr. Risley had considerable to do with the preparing of

the original papers that were signed by those who formed the National Harrow Company of New York; the preliminary papers to go into the organization.

He was looking after the general patent business of J. M. Childs & Co. I do not know what he had to do with the others.

I am sure I do not remember who the parties were or in what way the parties signed the papers, or how long before the meeting the papers were prepared.

The papers were not prepared by the parties outside from those who had the right to make harrows under the Reed patent.

They were not prepared by those outside; but my recollection is there was some talk with some of the parties outside at about that time.

I think they were Mr. Norris. The Eureka Mower Company.

202 The rest of them who were known as outsiders were Eureka Mower Company, E. Bement & Sons; I think Hench & Dromgold, the Farmers' Friend Manufacturing Company, and then as other manufacturers went into the business they came in. Some of them.

It is conceded that G. B. Olin & Company, A. W. Stevens & Son, D. C. & H. C. Reed & Company, Chase, Taylor & Company, Lawrence & Chapin, J. M. Childs & Company, are the parties that were in under the Reed patent when the corporation was organized, and arranged and did organize the National Harrow Company of New York. The other parties became licensees afterwards and came into the board of directors, with those who organized the National Harrow Company of New York.

Q. Mr. Childs, the National Harrow Company of New York, was not incorporated until arrangement had been made with the Eureka Mower Company and E. Bement & Sons, and some other of the manufacturers to come into the arrangement, was it?

A. I do not remember whether it was incorporated after or before this arrangement was made.

Q. Don't you remember that a meeting was held soon after the decision of Judges Jackson and Brown in the Eureka case with some of those who were called outsiders, and they agreed to go in, if proper terms could be arranged?

A. I don't remember how long after that decision this meeting was held.

Q. Don't you remember it was before the company was organized?

A. I think it was; I am not sure about it. I think I remember the paper that was called the preliminary paper that all signed agreeing to go into it. I don't think I have a set of papers like those. I think these original papers were all destroyed; I

203 do not know of any. I don't know of any that were signed, nor do I know of any in blank.

Q. When the papers were signed, known as Exhibits 1, 2, 3, 4 and 5, the first set of papers had been destroyed, had they not?

A. My recollection is that they were taken up and destroyed when

these contracts which were placed in the hands of Mr. Norris in escrow were delivered.

Redirect examination:

The parties who organized the National Harrow Company of New York, stood in no other relation to each other than that of licensor and licensee, under United States letters patent.

I think after the organization of the corporation arrangements were perfected with other manufacturers to accept licenses and sell their patents to the company.

The present plaintiff has granted licenses to manufacturers who have begun the manufacture of float spring tooth harrows since the granting of these licenses.

A license has been granted to the Gale Plow Company of Michigan, to manufacture harrows under the company's patents. They are simply straight licensees on essentially the same terms as embraced in the licenses. There has been granted a license to Black & Company of Racine, Wisconsin. The same license as involved here. We have granted a license to the Bucher Gibbs Plow Company of Canton, O. Their relation is simply that of licensee.

The Pitts Agricultural Works of Buffalo is a licensee of this company. They are conducting their business under the license of this company.

The Syracuse Plow Company and Hench & Dromgold are
204 licensees of the company, and all of these concerns are conducting their harrow business under terms of a license like that in suit.

D. M. Osborne & Company are manufacturing their harrows under the license of this company and they are restricted to the same prices and terms of sales embodied in these other licenses. The difference in the contract, consisting in the fact, that they pay a lump sum instead of a dollar apiece on harrows.

Q. Who is the North-Molitor Company and where is it located?

A. The company is located at Lansing, Mich., and what it is, I don't know any more than I understand it is an offshoot or part of E. Bement & Sons Company. Their report (showing paper) has been delivered to me today by the defendant.

I offer this report in evidence.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

The REFEREE: I think it is admissible solely for the purpose of showing that the defendant has sold the number of harrows stated in the paper at the time stated.

Exception.

Report received and marked Pl'ff's Ex. 41, "S. E. J." The report reads as follows:

"*Folio Statement.*

LANSING, MICH., *December* 13, 1894.

Mr. Treasurer National Harrow Company, Utica, N. Y., in account with E. Bement & Sons (incorporated), manufacturers of agricultural implements, bob-sleds, heating and cooking stoves; A. O. Bement, president; C. A. Gower, vice-president; G. W. Bement, secretary and treasurer; C. E. Bement, superintendent; A. F. Molitor, assistant superintendent.

I hereby certify that the sale of float spring tooth harrows, float spring tooth harrow frames, lever spring tooth harrows, lever
205 spring tooth harrow frames, by E. Bement & Sons, during the month of November, 1894, were as follows:

Float spring tooth harrows, none.
Float spring tooth harrow frames, none.
Lever spring tooth harrows, (2) two.
Lever spring tooth harrow frames, none.

A. O. BEMENT.

Subscribed and sworn to before me this 13th day of November, 1894.

H. S. BARTHOLOMEW,
Notary Public for Ingham County, Mich. [L. S.]

Recross-examination:

I understand that this paper is furnished by the defendant by virtue of an order of the court. Made on motion to dissolve an injunction.

D. M. Osborne & Co. paid in a lump sum last year. They did not report the number of harrows sold.

Q. Do any other licensees pay a lump sum or agree to pay a lump sum?

A. I don't remember of any other one.

Q. How is it with those people at Canton, Ohio, the Bucher & Gibbs Plow Company?

A. They were not licensees until within the past few months, but their license royalty is a dollar per harrow.

Q. No other conditions except as in the others?

A. No.

Q. The Racine contract is that of a straight license for a dollar a harrow?

A. I think it is.

Q. Are there any others on different terms except the Osborne Company?

A. I don't think so; I don't think of any.

Redirect examination:

The granting of the Osborne contract was by the direction of the executive officers of the company.

206 Q. Was Mr. Bement in the board when the license was originally granted?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. I think he was in the board and on the executive committee at that time.

I remember he went down with me to Auburn to negotiate the license with me. That license granted to Osborne was after defendant took a license.

Q. Did you and Mr. Bement negotiate at the meeting in Novem ber, 1892, at Auburn with D. M. Osborne on the terms of the license which was afterwards signed?

Mr. COOKINHAM: I object to that as incompetent, inamaterial and irrelevant.

Objection overruled. Exception.

A. We visited the office of Osborne & Company several times and negotiated the license contract to be entered into by our company and the Osborne people.

HEIBER C. REED, a witness called and sworn for the plaintiff, examined by Mr. Risley, testified as follows:

I am 42, live at Kalamazoo, Mich., am a member of D. C. & H. C. Reed & Company. They were the pioneers in the United States in spring tooth harrow business, other than David L. Garver, who was the patentee of the patent under which we operated. That concern was the first concern that practically put harrows on the market. We continued in business to September, 1894, that is the float spring tooth harrow business; we are still in the wheel-harrows and horse-rake business.

We were before the quitting of the business, one of the licensees of this plaintiff, The National Harrow Company.

I was made a member of the committee of the executive board who passed upon the granting of lever-harrow licenses at

207 Auburn, in the fall of '92. And was present at that meeting and participated in the proceedings at that time. There were four of the original executive committee and I was added. At that time I was member of the board of directors. I recollect and was present at the meeting of the directors of the National Harrow Company of New York, held at Buffalo in the fall of '90, when the board of directors were organized and the subject of granting licenses was considered. At that time and prior to that time our firm were manufacturing what was termed wheel spring tooth harrows or cultivators

as we called them. I have cuts of that cultivator as we manufactured it in '90.

(Cuts produced.)

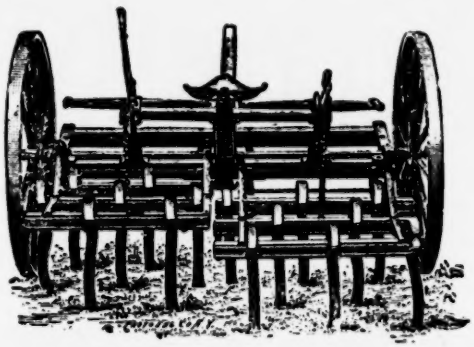
(WITNESS:) We were building two or three kinds of wheel harrows. The first harrows we made is——

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. The first wheel harrow we made is illustrated in our catalogue which I now have.

Cut offered in evidence and marked "Pl'ff's Ex. 42, S. E. J."



We were in '90 manufacturing and marketing harrows like that illustrated in the cut, marked "Ex. 42."

208 Mr. COOKINHAM: I object to this class of evidence as incompetent, immaterial and irrelevant.

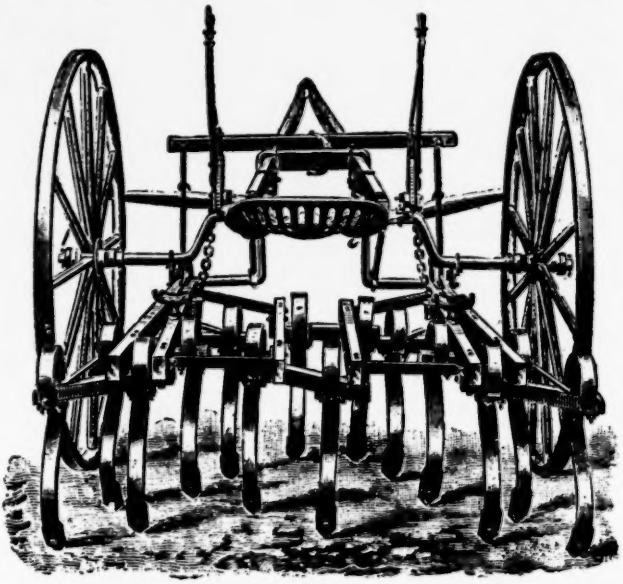
Objection overruled. Exception.

The frame bars to which the harrow teeth in Ex. 42 are attached in no condition come in contact with the ground when the harrow is used.

Q. Were you manufacturing the harrows illustrated in the catalogue which you now have before you in 1890?

A. We were making wheel cultivators with spring teeth and I think at that time was making two different kinds, one of them illustrated as a corn cultivator with wood axle, but I can't remember just when we were making the steel axle. I think we were building both kinds then.

Cuts offered in evidence and marked "Exhibits 43 and 44, S. E. J."



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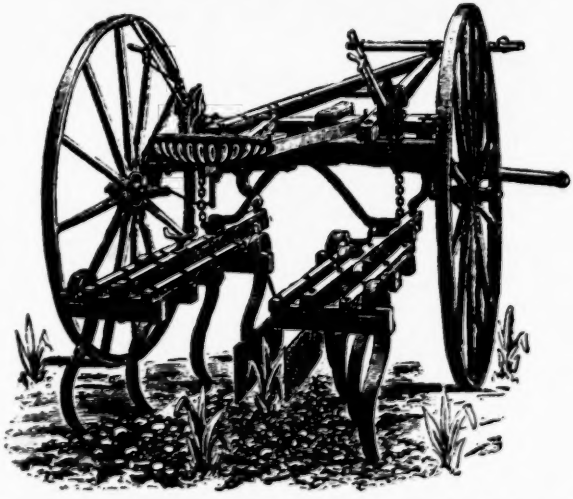

The frame bars to which the teeth are attached in the cultivators illustrated in Exs. 43 and 44 never come in contact with the ground when the harrow is used or transported, in any of our wheel harrows or any other that I know of.

The technical term applied to these tools, like these illustrated in the three Exhibits 42, 43 and 44, and they are known in the trade as wheel harrows, the section or frame is carried upon the wheels or by the wheels and are governed in depth in that way; and a float harrow, rides upon either the tooth bars or frame, and the frame itself acts as a lever. And so to speak, it is a drag.

Of the licensees of the New York Company, at the time we were at Buffalo, in the fall of '90, the following were manufacturing what you might term a wheel cultivator or harrow, as I now remember, D. C. & H. C. Reed Company; G. B. Olin & Co. I think L. C. Lull & Company and the Lawrence, Chapin Company. I can't tell about Stevens; he began very soon, but whether as early as that, I don't know.

210 Q. How did these various wheel harrows or cultivators which you have referred to, correspond in construction with those illustrated in Exhibits 42, 43 and 44?

Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and improper.

Objection overruled. Exception.

A. These are supposed to be as nearly a representation of them at that time as was possible to make. What these others built were similar; we didn't consider theirs as good.

The frame bars to which the teeth were attached in these harrows which I have referred to, never come in contact with the ground when in use or transported, are always free from the ground; not calculated or capable of coming in contact with the ground.

At Buffalo in '90, there was objection raised to including wheel cultivators or harrows in the terms of the license contract of the National Harrow Company by myself, representing D. C. & H. C. Reed Company, and as I remember Willis Tuttle for G. B. Olin & Company, as we were both manufacturing wheel cultivators with spring teeth at that time; there may have been others who made the same objection, but these two I remember. I have not examined "Pfff's Ex. 'Ajax Harrow'" particularly.

I have examined whether it was a float harrow or something else.

Q. From your knowledge and experience in the business, what would you say about that being a float spring tooth harrow?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and improper for an expert witness to speak in that way.

The REFEREE: Is that what you would call as known in the trade a float spring tooth harrow?

211 A. Yes, sir; I should add the word lever float spring tooth harrow. Though the lever makes no difference with its being a float harrow.

Exception.

I remember the meeting of the board of directors at Murray Hill hotel in September, 1892, and was present.

We met at Auburn in November, '92, following that they begun to build and market lever harrows in the fall of '92, but didn't ship very many harrows until after January, '93. So between January and August, we had practically the year's trade on the harrows, but very little trade in '93, after the first of August.

I was in Detroit about the time a meeting of harrow manufacturers was held in Sept., '94.

I met there several gentlemen who were there to attend the meeting, at the Cadillac hotel, but my arrangements to sell out at that time were so nearly completed, that I did not feel as I ought to attend that meeting, but was there to talk with the different gentlemen and to keep myself posted in case the sale should fall through or anything should happen.

I met several of the different gentlemen there who were interested in the harrow business. I met Mr. Metcalf who was representing the Osborne people——

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

(Witness continues:) And Mr. Dromgold of the firm of Hench & Dromgold, Mr. Bement, A. O., and a gentleman representing the Bucher & Gibbs Plow Company of Vanton, Ohio. There were others, but I remember these gentlemen.

Q. Now, did Mr. Bement, Mr. Arthur O. Bement, make a statement at that time with reference to the number of harrows which his company had sold in the previous year?

212 Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and hearsay.

Objection overruled. Exception.

I was having a little conversation with Mr. Bement we were anxious to have him attend the meeting in New York of the directors of the National Harrow Company, and during this conversation, the subject of the number of harrows which the different concerns had built was spoken of, Mr. Bement did not tell me the number of harrows that they had made and sold, but stated that he thought it was about the same number as they had made the year before.

Q. Was that meeting, as you understand it, called by some one, and if so, who?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

At one time we had a letter from somebody connected with the Buffalo Pitts' concern inviting me to attend the kickers' meeting to be held in Detroit, but I don't remember anything about it.

I was kept informed possibly by Mr. Lull or somebody else, but I have no memorandum or anything to show the fixed date of that

meeting; it was just before the directors' meeting of the National Harrow Company in New York.

Q. You say a "kickers' meeting," what was the purpose of the meeting as you understand it?

Mr. COOKINHAM: I object to that as incompetent.
Objection overruled. Exception.

A. I can't tell you, as I did not attend the meeting; I was not present at the conference.

Q. But you know they did go into a room and remain some length of time?

Mr. COOKINHAM: I object to that.
Objection overruled. Exception.

213 A. Yes, sir; but I having made an arrangement to go out of business kept outside.

Q. Have you seen their lever harrow, like the section here in court, in different places at any time during the past year?

Mr. COOKINHAM: I object to it as incompetent and immaterial.
Objection overruled. Exception.

A. I have seen this harrow somewhere before, but can't remember where, but have no knowledge whether it was sold or what was being done with it. I can't remember where. I think I have seen it in freight-houses.

In '92, in the harrow year '92, which terminated in August, 1893, Bement & Sons manufactured and marketed a different style of harrow than the section in the court, marked the "Ajax harrow." I saw some of their harrows of different construction; had one of them in my factory at one time. I think the teeth were fastened on the bars on the harrow manufactured in '92–'3, by being bolted on in substantially the same manner as Pl'ff's Ex. Lever Harrow I think, but would not swear positively. That is my best recollection.

I know the Steel King harrow. Before the organization of the National Harrow Company of New York, there had been a large amount of litigation over alleged infringements of patents owned by D. C. & H. C. Reed & Company and by G. B. Olin Company with other manufacturers.

The first party who took licenses under their patents to build float spring tooth harrows, as I now remember it, was the Olin Company or myself. I can't tell you who was the first; originally the Reed Company owned the whole of the patents and Olin & Company were licensees; afterwards they became owners in separate territories. After these the next parties were, I can't tell you
214 the order; there were several licensees; Chase, Taylor & Company took a license under these patents, but that was quite a long time after the business had been started; there were others before them; several others.

Lawrence, Chapin & Company took a license at one time, and Stevens & Son and J. M. Childs & Company. There was no other relation between those respective parties than of owner of the

patents and licensees until the organization of the National Harrow Company at that time.

We had a suit in the Michigan district with E. Bement & Sons; they conducted the defense.

Cross-examination:

It is my impression that there was a price agreed upon at which harrows should be sold under the Reed patent, but I would not be positive about that; that was quite a while ago.

J. M. Childs & Company was the predecessor of C. H. Childs & Company, I understand.

Q. The concerns that had the right to make harrows under the Reed patent, and which you have named, had some sort of an organization among themselves; they used to meet together?

A. You say we had an organization; I don't think that is correct; I think Olin & Company licensed the different ones; we had some sort of an arrangement with Taylor & Henry, Lawrence & Chapin and a little different from that with Childs & Stevens; but as I remember Childs & Stevens had nothing to say but to accept their licenses; we frequently used to meet together in a business way.

I remember being at Buffalo and at Niagara falls now that you speak of it in 1890.

And afterwards the six concerns that were manufacturing
215 or selling under the Reed patent, and which I have named, started into organizing a corporation to be known as the National Harrow Company.

Then the Eureka Mower Company and the defendant here and several others came in afterwards into that organization.

I think I have no copy of the papers that were first signed in regard to that arrangement. When I sold out to the Standard Harrow Company all the papers I had or could find were surrendered to them. There were a great many different contracts from time to time, and there were so many I would be confused if I undertook to tell you about them.

That litigation I speak of in answer to Mr. Risley's question, was brought largely under the Reed patent and nearly every one that manufactured a harrow in this country was claimed to be an infringer upon that patent. We claimed nearly every one were infringers on the Reed and Garver patents.

You cannot have a float harrow that will not rest on the ground.

I think there is no harrow that is a better working harrow than the old Reed harrow, where the frame entirely rests upon the ground.

The wheel on a wheel harrow performs the office of carrying the sections or the tooth bars.

The object is that you have perfect control of the section or tooth bars by having them on the wheel and many of these machines are used for cultivating corn, etc., and it is desirable to shift the section to avoid tearing up the hills, etc.

The depth which the teeth go is regulated by the lever, which is

usually carried by the wheels in some way; the purchase would be that the wheel rests upon the ground, and then by the use of the lever the teeth can be drawn up.

216 The size of the wheels are from 48 to 52 inches; some may use a little smaller or larger; that is about the standard. I think Mr. La Dow got up such a harrow with small wheels.

If a runner was attached to a harrow, that lifted the frame as high as the wheels I have spoken of, and in every other respect the harrow was the same I would call it a float spring tooth harrow with elevated frame.

We always consider anything that drags, that had any kind of a floating surface, was a float harrow; we have built harrows with shoes that you speak of, but consider them a float harrow and should advertise them as float harrows.

I saw a lever harrow before 1891. Lever harrows are old; if you refer to spike teeth. I saw a float harrow made a good many years ago, one by La Dow with a lever and another made by a man by the name of Foster in Kalamazoo, another made by E. Dunbar; there may have been others, I don't remember.

They were not successful in ever establishing any trade on these harrows; we didn't like the machines well enough to make them; I think we had the right to use the La Dow harrow if we wanted to; there are a great many loose parts and there was no great demand for anything of that kind at that time.

Now a lever has nothing to do with a harrow, as to whether or not it is a float spring tooth harrow. The lever is not the thing that distinguishes it. There is no merit in the lever whatever. A harrow may be a float spring tooth or may not be irrespective of the lever.

In regard to the meeting at Buffalo in '90, it was there decided that the term float spring tooth harrow, excluded wheel harrows as I understand it. I won't say that was all; that was one feature. The question came up whether or not if this license was used, it would affect myself and others who were manufacturing a wheel harrow. I think I made the suggestion myself, to use the

217 term float spring tooth harrow, as we were building wheel harrows and we didn't want to pay royalty on them, we used this term to identify or separate the two distinct line- of goods. It had been used all through this conversation and talk. It was concluded that the form of license which was then submitted did not include the wheel harrow. That was the understanding that the wheel harrow did not come under these licenses. The Garver patent had expired.

Under any circumstances, you can't make any wheel harrow that the Reeds build touch the ground.

I don't remember about the first set of papers being declared illegal, but I understood the first set of papers were cancelled. And the ones now examined were signed by the parties that went into the National Harrow Company, up to the time of arbitration at Bagg's hotel it is my understanding, it was so. I was present at Bagg's hotel at the arbitration, at least part of the time; I think I

went home before it was completed. A great many of the licensees were present; don't remember just who.

Redirect examination:

Well up to the last two years the harrow in the general market was largely wood and steel frames. I think we have gone through two seasons on lever harrows; the last two seasons, it has been almost entirely, at least four-fifths steel lever harrows, and the trade now is pretty well on lever harrows, would say at least four-fifths or more; and that the plain steel harrow is almost a thing of the past without levers. An all steel frame harrow has been in the market, whether lever or non-lever for five or six years, I don't know but more.

In wheel harrows there is some mechanism employed by which the relative position of the harrow frame and teeth can be changed.

The teeth are adjusted some up and down, we build one ma-
218 chine by series of holes in the castings. There is mechanism in a wheel harrow by which gangs of teeth can be simultaneously adjusted in reference to the frame bars to which they are attached. I think the wheel on which the harrow is supported and the axletree are not any part of the mechanism.

The frame is stationary and they roll the rolls to get the adjustment of the teeth; for the purpose of getting the teeth in and out of the ground.

Recross-examination:

That is so on lever harrows that are not wheel harrows. On some of them.

Mr. RISLEY: I offer in evidence portions of the defendant's answer, as follows:

(1.) "4. The defendant admits that it performed all the stipulations contained in the said alleged license contracts, A and B, and lived up to the requirements thereof, up to the first day of August, 1893."

(2.) "5. Defendant further answering said complaint admits that it has not signed and verified reports and mailed the same to the National Harrow Company of New Jersey of the sale of harrows, harrow frames, and attachments applicable thereto, between the first and tenth day of each month, since the first day of August, 1893. Defendant also admits, that since that time it has made no reports and that it has sold and delivered a large number of harrows, harrow frames, and attachments applicable thereto."

(3.) "Defendant further admits, that it has kept books in which it has entered its sales of harrows, harrow frames and attachments applicable thereto, that it has refused and still does refuse to allow plaintiff or its duly authorized agent to inspect, during business hours, said books, and that it has refused, and still does refuse
219 to allow extracts to be taken from their said books for the information of plaintiff. And defendant further alleges, that said books contain entries of sales of harrows, harrow frames and

attachments applicable thereto, very few of which are even in form covered by the alleged licenses A and B, referred to in the complaint herein."

(4.) "Defendant further admits, that the plaintiff has kept on hand, labels to be placed upon harrows for those who desire the same, but that defendant has not placed any labels upon such harrows as it has manufactured or sold and which are not float spring tooth harrows."

(5.) "The defendant further answering said complaint, admits that it has manufactured and sold, and has now on hand for sale, and intends to sell other and different harrows, harrow frames and attachments applicable thereto, and other and different constructions from those referred to in said alleged license contracts A and B, and that said defendant has manufactured and sold a number of lever harrows employing curved teeth, known and designated by the defendant in its trade, as the 'Ajax' harrow, and that said harrows have not been manufactured or sold or furnished any licensees of the plaintiff."

(6.) "But defendant admits and alleges, that it is now and has been manufacturing and selling harrows which are not covered by the said alleged license contracts A and B, nor is any part of said harrows or any attachment thereto, covered by said alleged license contracts A and B."

(7.) "The defendant admits and alleges that it has on hand harrows entirely different in form and construction, than duplicates of those which were deposited with the secretary of said plaintiff, but the defendant alleges that none of said harrows or parts thereof or attachments thereto are covered by said alleged license con-
220 tracts A and B, except such harrows as are known as the "Steel King," and one known as wood frame lined without teeth, a very few of which the defendant has manufactured and sold or offered for sale since the first day of August, 1893."

(8.) "9th. For a further answer to the said complaint, in regard to the sale of harrows, referred to in said complaint which plaintiff alleges were sold in violation of the terms of the said alleged license contracts A and B; defendant alleges that the defendant sold harrows through traveling agents, whose salaries were based upon the amount of goods sold by them and that the agreements with such agents are, that they shall make no rebate or allowance of any kind exceeding $2, upon each harrow, and that if said traveling agents make any allowance to customers from the prices fixed upon the specific harrows, as set forth in said alleged license contracts A and B, said allowance shall be taken in full from the salaries which otherwise would be allowed to said traveling agents."

(9.) "10th. For further answer to the said complaint, defendant alleges, that it has attached to the harrow known as the 'Steel King' and the harrow known as 'Wood framed lined' without teeth, labels provided for in said alleged license contracts A and B, but that none of said labels have been attached to any other harrows manufactured or sold by said defendant, since the first day of August, 1893."

Mr. Cookinham continues to read where Mr. Risley stopped:

Mr. Risley in "2" stops with the word "thereto" and I continue to read, "but defendant denies that said harrows so manufactured and sold by it, were covered by said alleged licenses A and B, or that any part of or attachment to said harrows were covered
221 by said alleged licenses A and B, or by any patent owned or claimed to be owned by plaintiff."

In regard to the one where he stops with the word "plaintiff" I will read, "But defendant denies that said harrows are float spring tooth harrows, or that said harrow is covered by said alleged license contracts A and B, set forth in the complaint."

WILLIAM V. WALKER, sworn for the plaintiff, testified as follows:

Am 50 years old, and a manufacturer of agricultural implements at Moravia, Cayuga county, N. Y. Am president of the Walker Manufacturing Company of that place.

The Walker Manufacturing Company was licensee of the National Harrow Company at one time. "Pl'ff's Ex. Walker Harrow," is a duplicate harrow of the one which I manufactured and sold under the license of the plaintiff. I am somewhat familiar with what is known as a wheel cultivator or wheel harrow. The distinction between a wheel cultivator or harrow having spring teeth and what is called a float spring tooth harrow, as I understand it, is a wheel harrow is where the frame is carried free from the ground, never touches the ground, and a float harrow is one that floats upon the ground.

—. Please look at that harrow, Plaintiff's Ex. "Ajax Harrow" and state whether that harrow would be termed among agricultural dealers, as a float spring tooth harrow?

Mr. COOKINHAM: I object to it as immaterial, irrelevant and improper to an expert witness.

Objection overruled. Exception.

A. I should call that a float harrow; that would be termed among dealers and manufacturers a float harrow.
222 We have ceased to manufacture under our license for about two years.

The office of a lever on a float spring tooth harrow I should think was to adjust the teeth more readily than it could be done otherwise. The lever performs no other function than that of adjusting the teeth in the harrow.

I should not think the addition of a lever would change a harrow from a float spring tooth harrow to something else. I have been engaged in the active practical manufacture of agricultural implements fourteen years, and during that time I have been superintendent of our establishment, and superintended the practical construction of whatever was built there. We built the Walker harrow and marketed it for several years. It was provided with runners, the same as appears on this section, in court.

At the time the license was granted to us there was no other har-

row, so far as I know, that used runners, on which the harrow was borne, when used or in transporting it, only one to my knowledge. I have no interest in this controversy in any way. I came here at the request of the plaintiff.

Cross-examination:

In our harrow that is on exhibit here, there was no way of elevating the teeth, so that the frame could rest upon the ground, and that we could transport the harrow through the field, without the teeth being in the ground, except you take each tooth separately. I don't know as you would term the runner a draft-bar; part of the frame. It runs the same as the line of draft.

The harrow frame would not touch the ground at any time until the teeth went into the ground a sufficient distance to allow the frame to touch the ground. Some claim it is desirable to
223 have the frame of a harrow touch the ground when in operation for crushing lumps. There might be some advantage to have a wheel harrow that would hold the frame free from the ground. A wheel harrow would be a lighter draft, where the teeth only come in contact with the ground than where the teeth and the frame, both come in contact with it. The depth of the cut of the teeth would not be regulated in our harrow by the runner. The office of a wheel on a wheel harrow is to carry the frame or carry the harrow. The frame was lowered from the wheels, so the wheels of course regulated the depth. The wheels in the harrows you have referred to are from three feet to perhaps four. I don't think I ever saw any of the small wheels. I don't know whether there were any of them with small wheels. I first heard the term "float spring tooth harrow" used several years ago. At that time there was no spring tooth harrow except what was termed with us as the Perry harrow.

The Perry harrow was one made under the Garver and Reed patents or G. B. Olin & Company. I first knew of a lever spring tooth harrow three or four years ago; I might go further back than that. The fact that a harrow has a lever or has not a lever, has nothing to do with its being a float spring tooth harrow.

Q. Suppose a runner was placed upon a spring tooth harrow that would hold the frame entirely free from the ground at all times, just the same as the wheel?

A. I should say it was a float harrow, because it floats upon the ground. A harrow upon runners would not be raised free from the ground like one on wheels. Supposed it was raised; that it was carried at all times on a runner that held the frame a foot from the ground I should call that a float harrow, because it floats on the ground. The runners are a part of the frame.

I don't know as I can explain why a runner constructed
224 that way does not perform the same service as a wheel. The wheel harrows that I have seen have all had large wheels, and the frame has been hung so it tilted the teeth down, making them go into the ground, and a runner like you speak of, I don't know how they would arrange that.

Assuming it was arranged; supposing a bar was placed with the runner upon one end and a runner upon the other, that would hold the harrow frame a foot from the ground at all times, the spring teeth were placed upon the frame in that way I should say it was a float on runners. The distinction I make is one floats and the other rolls. Then the size of the wheel I don't think would make any difference.

We sold out to the Standard Harrow Company our business and went out of business.

Plaintiff's counsel offers in evidence original letters patent of the United States, dated February 17, 1891, No. 446,820, granted upon the application of De Wane B. Smith, filed in the Patent Office on the 25th day of September, 1886, patent being issued to Warren M. Brinkerhoff as assignee.

Objected to as incompetent, immaterial and irrelevant.

Offer withdrawn.

HENRY LOVE, a witness called and sworn for the plaintiff, examined by Mr. Risley, testified as follows:

My age is 35, am one of the firm of Risley, Robinson & Love. I went to Lansing in November and I saw Mr. Arthur O. Bement on the 8th of November, 1894, at the defendant's establishment in Lansing.

Mr. Charles Wilkinson of Chicago, representing the firm of the accountants, Barrow, Wade & Guthrie, was with me and together we called at the office of defendant and we saw Mr. Arthur O. Bement, president of the defendant, and I made the request of him——

Mr. COOKINHAM: I object to that as incompetent, immate-
225 rial and irrelevant; it was long after their suit was brought; they can't show after they bring the suit that they violated the contract.

Objection overruled. Exception.

(Witness continuing:) I made a request of Bement for leave to examine the records of E. Bement & Sons and of the North-Molitor Company, also of their books and contracts and all papers relating to the business which they had been and were carrying on in the manufacture and sale of harrows. Mr. Bement said that the books of the defendant and of the North-Molitor Company were there, but that no examination whatever of these books or of the contracts or of any of the records would be permitted, and that no information whatsoever would be given; he also made the same refusal to Mr. Wilkinson in my presence.

WARREN M. BRINKERHOFF, recalled.

The lever harrow that the Pitts Agricultural Works of Buffalo were licensed to build is here, and a tooth section of the non-lever harrow, the section from which this tooth section was taken, is here somewhere.

I should say the Pitts Agricultural Works lever harrow had a

shoe extending downward from the lower side of the frame to which one end of the tooth is attached.

I have here a section of the harrow which D. B. Smith was licensed to build. There is a shoe on this harrow which extends below the lower side of the frame bars.

In the three sections which I produced here there is a shoe so arranged as to elevate the frame bars above the bottom of the shoe and the bottom of the teeth also. These harrows are in the same shape as they were when they were licensed by the company.

226 Q. Now taking the Buffalo Pitts non-lever license with the shoe extending under the frame, under what language was that granted in the license contract?

Mr. COOKINHAM: I object to that as incompetent and irrelevant. Objection overruled. Exception.

A. Licensed under the name of float spring tooth harrows. Being the same name as used in Exhibits 1 and 2, and the same as to the D. B. Smith harrow. Same construction, for the same purpose and under same form of license.

The distance which the bottom of the shoe on the Buffalo Pitts non-lever harrow, extends below the lower edge of the frame bar is two and three-fourth inches and on the lever float spring tooth harrow it is two and one-half inches.

The distance between the lower edge of the frame bar of the D. B. Smith harrow to the bottom of the shoe is two and three-fourths inches.

The runner on the non-lever Pitts Agricultural Works harrow projects farther downward than it does on the lever harrow.

Cross-examination:

The object of this shoe on the Buffalo Pitts non-lever harrow is to form a clearance between the teeth under the frame. The object of the shoe on the lever harrow is the same.

I mean by "clearance" a space between the teeth or their points of connection with the frame of greater vertical diameter than at the points where the teeth are attached, so that the grass, stones and other rubbish may pass along, instead of clogging the harrow.

This piece attached to the shoe of the Buffalo Pitts lever harrow and extending below the shoe is performing the same func-

227 tion as the shoes and other portions of the harrow perform, to elevate the frame, so rubbish will go between the teeth. In the Smith harrow the shank of the teeth forms the runner or shoe. As to whether that is practical would depend on the extent they use it. It would ruin the teeth if used to very much extent.

I presume at the time of the arbitration in Utica, at Bagg's hotel substantially all the manufacturers of the country had assented to the arrangement that was made by those who went into the National Harrow Company, but I couldn't swear to it. The only ones not represented was the Syracuse Plow Company and the Pitts Company. They were not the only ones making harrows in the country. There was A. B. Farquhar & Company, they made them at

that time, and a concern called Hebner & Company, they were in the business, but have gone out I think. Farquhar is not known in the trade of spring tooth harrows now.

The greater portion of the patents mentioned in the licenses 1 and 2 were assigned to the National Harrow Company, by those who took licenses from the National Harrow Company.

I think I have the means of telling which ones were not assigned by licensees to the National Harrow Company by licensees, except those that were passed upon by the arbitrators. I can't tell which without referring to the records in my office. Certain papers referred to in Exhibit 3. Those papers are contracts, assignments of contracts, agreements, instruments and covenants heretofore executed. I can't say what they are. I do not know whether or not it referred to any of those papers that had been passed upon by Judge Smith; I don't think I have any record of these matters at all or means of telling what it was. I presume there were, but I could not tell when or what their character was; papers executed be-

228 tween the execution of those that Judge Smith passed upon and these exhibits from 1 to 6 between these licensees and the National Harrow Company; I can't positively remember that there were any. I have not the articles of incorporation of this plaintiff.

Defendant's counsel offered in evidence the articles of incorporation of the plaintiff to be hereafter furnished by plaintiff.

My recollection of that is that the form of license was presented and adopted as a whole. The provision for $1 royalty was contained in the license at that time. The price of harrows was fixed by resolution of the board. The prices have not remained the same since the first schedule, they have been reduced by the combined request of the licensees sanctioned by the board of directors. The prices mentioned in Exhibits 1 and 2, are not the prices at which the defendant would be required to sell harrows at the present time since the last change went into effect. There have been some changes since August 1, 1893. Some particulars as to prices. I think it is on the books. That arrangement was made in September last. There has been two or three modifications in prices of harrows at different times.

There has been no changes that I recall except the changes made in reference to quantities to commission houses and sales houses and sales agencies. These changes were by resolution passed October 18, 1892. Motion by Mr. Bement, seconded by Mr. O. J. Childs, that the Van Horn plan of selling to jobbers in its general terms be adopted. Carried with the resolution amended to read as follows:

Resolved, That any licensee of the National Harrow Company may contract with not more than two transfer houses or sales agencies in any State to sell harrows to dealers.

229 Resolved, That all sales to dealers shall be made on blank orders furnished by the licensees and at the prices and on the terms established by the National Harrow Company.

Resolved, That $2.00 per harrow shall be the maximum price to

be paid by any licensee for selling through sales agencies such amount to cover the costs of selling, storing and transferring of harrows,

Resolved, That no rebate or commission shall be allowed on the harrows retailed by said sale agencies, but such harrows shall be settled for at the prices and on the terms established by the National Harrow Company.

Resolved, That a copy of this resolution be sent to each licensee by the secretary.

Motion by Mr. Bement, duly seconded, that the Bement plan for selling to jobbers be adopted. Carried, in form as follows: Resolved, That no licensee of the National Harrow Company employ any party outside of their regular working force to sell harrows, and that the price of harrows shall be the regular uniform prices as adopted by the National Harrow Company and that no harrows shall be sold at a less price than therein named, except in case of jobbers who buy not less than one hundred harrows in one order and in one shipment, and in such cases only a reduction of $2.00 may be made on each harrow from the price. All such jobbers must agree to sell to the retail trade at the regular National Harrow Company price, subject to cancellation for infraction of above rule.

Q. Have you got any of these papers or blank forms of those that were signed by these parties and which Judge Smith passed upon in the case of the Clipper Chilled Plow Company against the National Harrow Company?

A. I don't think I have; in fact I am sure of it.

230 Q. Don't you remember this, that after Judge Smith had decided that case, these exhibits put in evidence here, known as 1, 2, 3, 4 and 5 were agreed upon and that these were handed to Mr. Norris to be kept until all had signed them, do you remember that fact?

A. I know from the terms of these papers that he had them. I remember that he had them at Bagg's hotel when the arbitration occurred.

There are some of the licensees who do not pay a dollar per harrow. They are the Gale Manufacturing Company and the Bucher & Gibbs Plow Company.

There is no one now making spring tooth harrows in the United States, except those that are under a license of the National Harrow Company, or that have been sued by the National Harrow Company for infringing patents that I know of.

Redirect examination:

The parties who are manufacturing harrows, that are not licensees of the plaintiff are A. A. B. Farquhar of York, Pa.; Smith & Tate Company of Harrisburgh, Pa.; and the Clipper Chilled Plow Company of Elmira; Hebner & Sons, Peter H. Williams of Holland, Michigan; I don't know of any others. Turner Manufacturing Company of La Grange, Indiana, and I understand Whipple, St. Johns, Mich., D. S. Morgan & Company, Brockport, N. Y. They

have been manufacturing for two or three years past, and patent litigations are pending and in process of final disposition by the courts against their houses brought by the plaintiff. In some of them they are taking proof from time to time up to the present time.

Q. What other styles of harrows are being marketed in a general way in the United States, than what is known and termed as float spring tooth harrows?

231 Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. Spike teeth, disc and riding or wheel harrows, the clog-pressing harrow, pulverizing harrows—

Each of these styles and constructions mentioned in my last answer are being manufactured and marketed in large quantities in the United States.

Q. And in considerable larger quantities than float spring tooth harrows are sold?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. They are.

Q. Now referring to the Bucher, Gibbs Company's contract, what was the consideration for the rebate of less than $1.00 on their harrows?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. The assignment of and agreement to assign issued patents owned by the Bucher Gibbs Company and the agreement to transfer to this plaintiff, all pending applications for patents, and patents that might or may hereafter be obtained or secured by them in connection with float spring tooth harrows. In consideration of that a rebate was given them on their royalty of twenty-five cents per harrow. That twenty-five cents was to pay for the values which the plaintiff obtained by virtue of these contracts. The consideration for the rebate to the Gale Plow Company was the same. The executive committee of the plaintiff did this. In one case the Bucher & Gibbs Company was sanctioned by the executive committee of the board of directors of the plaintiff, the other was sanctioned by the board of directors, with power at that time given to the executive board, who in turn gave the power to close the deal.

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There was a prior contract with Osborne to the one which I have in court. I have that contract here.

(Papers produced.)

Mr. RISLEY: I offer them in evidence.

Contract of November 29, 1892, marked "Pl'ff's Ex. 46, S. E. J."
December 5, 1893, marked "Pl'ff's Ex. 47, S. E. J."
September 12, 1894, marked "Pl'ff's Ex. 48, S. E. J."

Q. Turn to the minutes of the company and read the action of the company with reference to the authority to make the Osborne contract; what was the action of the board on the subject in October 18, 1892?

Mr. COOKINHAM: Objected to as incompetent, immaterial, and irrelevant.
Objection overruled. Exception.

A. Motion by Mr. Bement; seconded by Mr. Reed. That a committee of two, Messrs. Brinkerhoff and C. H. Childs be appointed to confer with D. M. Osborne & Company as to taking a license from the National Harrow Company, "This resolution was adopted at a special meeting of the directors of the National Harrow Company, at the Brozel hotel at Buffalo, November 18th, 1892. This was after the annual meeting in New York and before the meeting of the executive committee at Auburn. There was an action after that by the board of directors or its executive committee. The executive committee met at Auburn in pursuance of a resolution passed at the last meeting of the board of directors at New York city, No-
233 vember 3, 1892, the committee met at Auburn; the committee appointed to investigate the matter of D. M. Osborne & Company taking a license from this company, having made a report, upon motion of Mr. Stevens, seconded by Mr. Norris. Resolved, That their report in reference to this matter be accepted. Carried unanimously." Mr. Bement was a member of the executive board that passed the last resolution and was present at that meeting. The report which was made to the board was a verbal one.

Q. Please state what, in substance, that report was.

Mr. COOKINHAM: I object to it as immaterial, irrelevant and hearsay.
Objection overruled. Exception.

A. I don't remember the details of what the report consisted of any further than it was made by Mr. Childs; a full text of that report is embodied in the first contract made with the Osborne people. This contract dated November 29, 1892. At that time this contract had been substantially agreed upon by the Osborne people. Mr. Bement went down to the Osborne Company, in company with Mr. Childs at the executive session in Auburn with reference to arranging for the contract which was afterwards signed, and participated in the negotiations.

Mr. COOKINHAM: I object to that as incompetent and immaterial.
Objection overruled. Exception.

A. He did. After the report was made to the other members of the executive committee and the parties added to that committee, Messrs. Stevens and Reed, further details came up, as regards the

contract, executed by the Osborne people later, and it was suggested that a committee consisting of several of the parties interested, can-
vass the points that were brought up at that time, and Mr.
234 Bement was one of the members; at that meeting the sub-
stantial matter in the contract was agreed upon with the Osborne people, and it was left with the attorney for the plaintiff, and of the Osborne people to put the contract in written form. The counsel for the plaintiff then was Mr. Duel. Messrs. Underwood and Stork and Mr. Starrow of Boston for the Osborne people.

This contract appears to have been executed and delivered on the 17th day of February, 1893. A very few days after the execution of this contract, the Osborne Company gave notice of its revocation. And that was the attitude of the contract at the annual meeting in 1893.

Q. Now, what action did the board take on the subject of the Osborne matter at the annual meeting in 1893?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. On the 12th of September, 1893, "Motion by Mr. Risley, that the chair appoint a committee of five to examine the Osborne contract and report to this board. Seconded by Mr. Stevens, carried. Committee appointed, Charles H. Childs, Edwin H. Risley, N. H. Stewart and Warren M. Brinkerhoff and Le Roy W. Stevens. September 13th, committee's report on Osborne contract received. Motion by Charles H. Childs, that the report be referred to the executive committee with power to act; seconded by Mr. Stevens and carried."

That report was made verbally to the board.

At a special meeting of the board of directors of the National Harrow Company, held in Utica, December 14, 1893, "the committee to whom was referred the settlement and adjustment of the Os-
borne contract matter with reference to royalties respectfully
235 report that on the 5th day of December, 1893, they succeeded
in effecting an adjustment with D. M. Osborne & Company, by which the latter firm paid the sum of $1,000 and entered into a contract by which they were to pay a royalty of $3,000 for the ensuing year, and for four years thereafter unless the contract is revoked by notice given in the month of August, 1894, annual royalty to be paid on September 15, and December 15, in each year." The contract is herewith submitted, all of which is respectfully reported. "Motion by Mr. Stevens, that the report of the committee on the Osborne business be accepted and the committee discharged." Dated December 14, 1893.

At the time the first Osborne contract was negotiated the plaintiff had brought a large number of suits, for using or handling the Osborne harrow which were then pending. There was also a matter at the date of the execution of the second contract, pending in the United States Patent Office, with reference to the ownership or right to control the Osborne harrow and harrows made like it, between

the Osborne Company and the plaintiff, and that controversy is still pending.

At the annual meeting in 1894, the subject of prices was considered by the board, and modifications of prices and terms were made. The prices and terms were fixed by the board; they were computed on a scale of general reduction of prices of everything below a lever harrow. Those terms as established by the board are embraced in this Osborne contract; the three Osborne's contracts. And all the company's licensees, excepting Bement and the North-Molitor Company, as I understand, have agreed to the agreements, similar to the Osborne contract; the third one.

The North-Molitor Company and the defendant have been
236 notified of the reduction and requested to sign the reduced-scale prices. They have not done so.

The scale of prices in every instance, in every license, which the company has granted has been uniform with all the other licensees. The Garver spring tooth harrow patent expired in 1886.

Recross-examination:

The harrow that is in the trade accepted as best with the seller or dealer, and most practical for the farmer is with a lever.

The Garver harrow or a harrow made under the Garver patent is still made, but not to any material extent.

A clogging harrow is for a special purpose.

The disc harrow has come into very general use in the Eastern States in certain territories, but not generally.

The peg harrow is one that has been used from the beginning of time to date, I think, and remains now just what it was fifty years ago.

The prices mentioned in Exhibit 48, are those that the licensees of the plaintiff are now authorized to sell, and no licensee of the National Harrow Company is permitted by the license to sell for any less price or on any different terms.

Mr. HENRY J. COOKINHAM, called and sworn for the plaintiff, testified as follows:

I am one of the defendant's attorneys in this action; I was one of the plaintiff's solicitors in the case of E. Bement & Sons against Charles La Dow, which was pending in the United States circuit court of the northern district of New York, and that case related to a controversy between this defendant as plaintiff in that suit, and

Charles La Dow, and is related to a license contract alleged
237 to be existing between La Dow and the Bement Company.

In taking the proofs in that action Arthur O. Bement was sworn and his evidence has been reduced to writing. I think the original deposition is not in my possession. I think it was sent to the man who printed that case at Lansing, and I think the original was never returned. I am not willing to swear that it never was returned, but that is my recollection. On the hearing in that case Mr. Arthur O. Bement's attention was called to the number of spring

tooth harrows which his concern had manufactured and he did testify upon the subject of the harrows. He made a statement in regard to it but I don't think he testified as to the number. My recollection is he handed the statement to the stenographer. He furnished the statement of the number of harrows which was to be inserted at the time, or it was agreed that he would finish it. There were numbers of harrows inserted in the records. I couldn't tell the number; I can tell what the printed case states; the printed case states on page 121, as follows: In answer to the question, "Can you give the number of 'Steel King' harrows manufactured by your company in each year since the contract, Exhibit '1' with La Dow was made, and up to the time of the commencement of your suit with him to cancel the contracts?"

A. I can as follows:

During 1889, 875.
1890, 4,435.
1891, 5,617.

From January first to May first, 1892, 3,341.

Mr. COOKINHAM: I object on the part of the defendant to this evidence as incompetent, immaterial and irrelevant and ask to strike out the answer on the ground that it is not proven against the defendant. It would not be proof against the defendant if they had produced the original deposition of Arthur O. Bement and offered it in evidence; it is clearly incompetent; if the
238 suit were against Arthur O. Bement it might be competent to put in evidence a deposition of his, but it certainly is not competent to put in evidence a statement by Arthur O. Bement on the witness stand as against the defendant; he is a witness there.

The REFEREE: I will receive it subject to a motion to be made later on to strike it out, if it is not proven.

Exception.

Mr. COOKINHAM: I give this under the same objection.

A. On page 125 of the printed case, it is stated in answer to the question, how many of those harrows, reference being made to the Clipper and Reliance, did you make in the years 1888, 1889 and 1890, and the answer appears to be as,

"We make Clipper harrows as follows:

"From March, 1889, to January first, 1890, 875.

"From January first, 1890, to January first, 1891, 4,435.

"From January first, 1891, to January first, 1892, 5,617.

"From January first, 1892, to May first, 1892, 3,341, and this is footed up to be 14,268.

"We have 'Reliance' harrows as follows:

"From January first, 1889, to January first, 1890, 272.

"From January first, 1890, to January first, 1891, 54, and this is footed up to be 326."

The figures which I have given are erased with a pen and opposite "875" is written with the pen "1,966;" opposite "4,435" is written "1856;" opposite 5,617 is written "1,656;" opposite "3,341" is written "396" and that is footed to "5,874." Opposite the "272"

is written "327" and opposite "54" is written "11" and footed up as "338."

239 Q. Did you give your last two answers when looking at the record upon which the case of E. Bement & Sons against La Dow was heard before the court?

A. A part of the record.

Q. Was the statement with reference to the number of harrows which you have testified to, furnished by Arthur O. Bement and extended in his evidence taken in that suit?

Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and as hearsay.

Objection overruled. Exception.

A. My recollection is, that the first set of figures that I gave, were given by Mr. Arthur O. Bement there while he was on the witness stand, before Mr. Thomas, a notary public, or else the numbers were left blank and he was to furnish them thereafter, and the notary was to put them in. The figures in the case on page 125, inserted with the pen, were not given according to my recollection at all by Mr. Arthur O. Bement while the examination was going on, but were furnished me in answer to a letter addressed to the company and were inserted at my direction by a clerk in my office.

Q. Was the change made in reference to what was stated in the letter from the defendant?

A. I can only say I suppose it was. I don't know it.

Q. You have no doubt about it?

A. I don't know it; I never compared those with the figures given us.

Q. Were the figures which were given the figures which were contained in the record of the case which was submitted to the court at the hearing of that suit?

A. I will say, that the figures that were printed, I know were the figures that are put in with the pen, I suppose are, I don't know.

Mr. COOKINHAM: I ask to strike out as incompetent, immaterial and hearsay, all of the evidence given by the last witness.

240 Mr. RISLEY: I think your honor should reserve that question.

The REFEREE: I think I will not change my ruling. If it is found incompetent, I will strike it out.

Plaintiff rests.

Mr. COOKINHAM: I now move to dismiss the complaint on the ground that it does not set forth a cause of action, and I move for a nonsuit on the ground, that the facts proved under the complaint, do not constitute a cause of action and for the further ground that the facts proved, show that the contracts sued upon are illegal contracts upon the ground of public policy and that they are in restraint of trade, and that the plaintiff does not show title to the license contracts, that is, that the license contracts were made with the National Harrow Company of New York, and that they are not assign-

able, and the exhibit which they have put in evidence does not transfer title to these licenses of this plaintiff.

The REFEREE: I deny the motion now; the question will be considered at the end of the case.

Exception.

Mr. RISLEY: I submit at this time, a motion for leave to amend the complaint by inserting in connection with the word "harrow" in every instance, or "harrow frames" the words "float spring tooth harrows and float spring tooth harrow frames."

Mr. COOKINHAM: Well, in that regard, I want to make this suggestion, that if the court permits that amendment to be made, it certainly should be upon terms. If the court comes to the conclusion that the complaint is defective.

Mr. RISLEY: If the court comes to that conclusion I should expect to make it on terms.

The REFEREE: The motion to amend the complaint will be considered, in the motion to dismiss the complaint made by Mr. Cookinham.

241 Mr. EDWIN H. RISLEY, a witness called and sworn for the defendant, testified as follows:

I reside in Utica and my profession is that of a lawyer and has been since 1869. I had something to do with the organization of the National Harrow Company of New York. I think I prepared the certificate of incorporation and attended to the incorporation of the company. It was put in evidence the other day. I drew a number of papers prior to the organization of the company and filed the certificate of incorporation. I have no copies of those papers that I know of.

I have looked in the place where I suppose, if I had any of them, they would be kept, but I can't say that I have looked through all the papers, covering the period when the papers would have been made, if at all. I don't just remember just how many; I know there was a number; they were drawn and redrawn and some of them were signed and some were not. There was a paper signed by some parties, which possibly might have been termed the preliminary agreement. I couldn't tell now who signed it. From my recollection it was signed by G. B. Olin & Company, J. M. Childs & Company, or Charles H. Childs & Company. I think by A. W. Stevens & Son and I think by H. C. & D. C. Reed & Company of Kalamazoo. W. S. Lawrence in the name of Lawrence, Chapin & Company, Taylor & Henry in the name of Chase, Taylor & Company, that was the name they were doing their business under at that time; I am not certain whether it was signed by the Eureka Mower Company or not. I don't remember about that. It was not signed by E. Bement & Sons. I think they were not requested to sign it; they signed an arrangement on the 17th day of September, 1890. I think that was

242 not in substance the same thing; that was a special contract, drawn by them to cover certain features which existed in reference to their business, as I remember it. After that and during the fall of 1890 my recollection is that the same parties signed bills of sale of the good will of their business. My recollection is

that they signed a paper, each of these parties, signed a paper by which they transferred for the period of fifty years, their business and the good will of their business to the National Harrow Company of New York, and accompanied that bill of sale with a bond. As I said, the other parties gave an independent paper in the nature of a bond. My impression is the parties signed a paper agreeing to submit the value of their patents and the good will of their business, etc., to arbitrators to determine its value.

I have no remembrance of any papers other than the papers which I have mentioned being signed. I will say in addition to that, they also made a separate assignment of their respective patents which they then owned. They were executed for the purpose of transferring the title and record.

The Clipper Chilled Plow Company of Elmira executed some papers. I wouldn't say they executed the same papers. My recollection is that those papers differed somewhat, although they may have been of the same general purport.

Q. Have you a copy of those papers which were executed by the Clipper Chilled Plow Company and the National Harrow Company?

A. I don't know whether I have or not.

Q. Just look and see.

A. I have some papers here in litigations which arose out of transactions with that company. All of the original papers which were made between the National Harrow Company of New York and its licensees, including the papers referred to by Mr.
243 Cookinham, as I remember it were all delivered into the possession of Mr. Norris and Warren M. Brinkerhoff; I recollect that it was ordered by the board of directors of the National Harrow Company to have those papers surrendered and on that order I delivered what papers I had in my possession, and so far as I know, I delivered them all to those gentlemen. They were delivered to them because they were ordered to be delivered by the directors of the National Harrow Company.

I understood that the board of directors, after the decision of Judge Smith, decided to cancel all those papers, and have them surrendered up and destroyed, obliterated by destruction and whether it was ever done or not I have no knowledge; all I know is that the papers that I held were delivered up to the parties before named, and what they did with them I do not know.

Mr. Norris is dead; he died I think in February, 1893. At that time he was treasurer of the National Harrow Company of New York; at the time of his death and also at the time I delivered the papers to him. I have never seen those papers since.

I drew a number of papers after the decision of Judge Smith up to a certain period.

I think I never did any business for the company after February or March, 1891. I will correct my answer and state that my business relations with the company terminated practically just before the arbitration heretofore referred to, which took place on the 16th or 17th of June, 1891; after that arbitration I had no business relations with the company, with either company until the fall of 1893,

so far as acting as their counsel or adviser was concerned, except in this regard, there were certain suits pending brought by J. M. Childs & Company, which the National Harrow Company
244 assumed the conduct of, and I continued in these cases by special request of the officers of the company, otherwise than that, I had no other business relations with him.

The papers which I drew after Judge Smith's decision, in the case of Strait, representing the Clipper Chilled Plow Company against the National Harrow Company, was the license contracts similar to Exhibits 1 and 2, and agreements similar to 3, 4 and 5. I can't state now who of the harrow manufacturers signed those exhibits from 1 to 5, but quite a number of them. I don't remember them.

The exhibits referred to in my last answer, were signed such of them as were signed at all, between the first day of April, 1891, and the 17th of June, the same year. I would not say exactly that they were delivered to the respective parties; I think they were delivered to the parties respectively, about the 15th or 16th, and possibly the 17th of June.

I was present at the arbitration which took place under the agreement to arbitrate, as to the stock, part of the time, during the progress of the proceeding. I think the arbitrators made an award of the stock to the respective parties.

Mr. COOKINHAM: I offer in evidence certified copy, articles of incorporation of plaintiff.

Received as follows:

This is to certify, that we, Henry H. Durr, Charles A. Long, John N. Murphy, Edward C. Ryan, George H. Spitzli, William E. Seavey, George B. Davidson, Arthur E. Cole, James W. Dunlop, Walter H. Parker, Charles H. Tarbell, William H. Cort and Frank H. Doolittle, do hereby associate ourselves into a company under and by virtue of the provisions of an act of the legislature of New Jersey, entitled An act concerning corporations, approved April 7th, 1875, and the several supplements thereto and amend-
245 ments thereof for the purposes hereinafter mentioned, and to that end, we do by this, our certificate set forth:

First. That the name we have assumed to designate such company and to be used in its business and dealings is the National Harrow Company.

Second. That the place in this State where the business of such company is to be conducted is Jersey City, in the county of Hudson, in which the principal part of the business of such company within this State is to be transacted; that the principal place of business out of this State is to be situated in the city of Utica, in the county of Oneida, in the State of New York; that the States of New York, Pennsylvania, Ohio, Indiana, Illinois and Michigan are the other States of the United States in which it proposes to carry on operations and that the objects for which this company is organized are to manufacture, purchase and sell agricultural implements and machinery and the rights to make and use the same, and all the

lawful business incidental thereto. That said company is to transact its financial and executive business at its office in the city of Utica, New York.

Third. That the total amount of the capital stock of said company is five hundred thousand dollars; the number of shares into which the same is divided is five thousand, and the par value of each is one hundred dollars. The amount of capital with which said company will commence business is five thousand dollars.

Fourth. The names and residences of the stockholders and the number of shares held by each are as follows, viz:

Names.	Residences.	No. of shares.
Henry H. Durr	Utica, New York (Five)	5
Charles A. Long	Utica, New York (Five)	5
John M. Murphy	Utica, New York (Five)	5
Edward C. Ryan	Utica, New York (Five)	5
246 George H. Spitzli	Utica, New York (Five)	5
William E. Seavey	Utica, New York (Five)	5
George B. Davison	Utica, New York (Five)	5
Arthur E. Cole	Utica, New York (Five)	5
James W. Dunlop	Utica, New York (Three)	3
Walter H. Parker	New Hartford, N. Y. (Three)	3
Charles H. Tarbell	New Hartford, N. Y. (Three)	3
William H. Cort	New Hartford, N. Y. (Two)	2
Frank H. Doolittle	Mohawk, New York (Two)	2

Fifth. The period for the commencement and termination of the company shall be from the day of the date of the acknowledgment hereof to and for a period of fifty years thereafter.

In witness whereof, we have hereunto set our hands and seals the 6th day of July, 1891.

HENRY H. DURR. [L. S.]
CHAS. A. LONG. [L. S.]
JOHN M. MURPHY. [L. S.]
EDWARD C. RYAN. [L. S.]
GEO. H. SPITZLI. [L. S.]
FRANK H. DOOLITTLE. [L. S.]
CHAS. H. TARBELL. [L. S.]
WILLIAM E. SEAVEY. [L. S.]
WALTER H. PARKER. [L. S.]
ARTHUR E. COLE. [L. S.]
JAS. W. DUNLOP. [L. S.]
GEO. B. DAVISON. [L. S.]
WM. H. CORT. [L. S.]

STATE OF NEW YORK, } ss:
County of Oneida, }

On this 6th day of July, 1891, before me personally appeared Henry H. Durr, Charles A. Long, John M. Murphy, Edward C. Ryan, George H. Spitzli, William E. Seavey, Arthur E. Cole,
247 James W. Dunlop, Walter H. Parker, Charles H. Tarbell and Frank H. Doolittle, to me personally known to be the indi-

viduals who executed the above instrument and each duly acknowledged that he executed the same.

H. D. PITCHER,
Notary Public, Oneida Co., N. Y.

ONEIDA COUNTY, *ss:*

On this 9th day of July 1891, before me the subscriber, personally came George B. Davison and William H. Cort, to me personally known to be the individuals described in and who executed the foregoing instrument and each for himself duly acknowledged the execution thereof.

H. D. PITCHER,
Notary Public, Oneida Co., N. Y.

STATE OF NEW YORK, }
Oneida County Clerk's Office, } *ss:*

I, Frederick D. Haak, clerk of said county, and of the supreme and county courts therein, the same being courts of record, do hereby certify, that H. D. Pitcher, whose name is subscribed to the certificate to the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment, a notary public for said county, dwelling in said county and sworn and duly authorized to take the same. And further that I am well acquainted with his handwriting and verily believe that the signature to the certificate of said proof or acknowledgment is genuine. And further that said instrument is executed and acknowledged according to the laws of the State of New York.

248 In testimony whereof I have hereunto set my hand and affixed the seal of said county and courts at the city of Utica, this 15th day of July, 1891.

[SEAL.] F. D. HAAK, *Clerk.*

Endorsed: "Received in the Hudson county, N. J., clerk's office, July 15th, A. D. 1891, and recorded in Clerk's Record No. 13, on page 268. Dennis McLaughlin, clerk."

Endorsed: "Filed July 31, 1891. Henry C. Kelsey, secretary of state."

STATE OF NEW JERSEY, }
Department of State. }

I, Henry C. Kelsey, secretary of state of the State of New Jersey, do hereby certify, that the foregoing is a true copy of the certificate of incorporation of the National Harrow Company and the endorsement thereon, as the same is taken from and compared with the original filed in my office on the thirty-first day of July, A. D., 1891, and now remaining on file therein.

In testimony whereof, I have hereunto set my hand and
[L. S.] affixed my official seal, at Trenton, this twenty-seventh day of June, A. D. 1893.

HENRY C. KELSEY,
Secretary of State.

(Endorsed:) Ex. 49. Certified copy of certificate of incorporation of the National Harrow Company.

It is conceded by both plaintiff and defendant, that they have filed their articles of incorporation with the secretary of state of the State of New York, and have complied with the statutes of the State of New York, which entitled them to do business in this State.

249 I think the plaintiff has manufactured harrows. I procured to be manufactured some harrows in Kalamazoo and also in this State. They procured them to be made by manufacturers, and I think it employed help to put them together. I think it was last year and year before, and I think some work is going on now. To the extent of several hundred harrows; I don't know just how many. They have no manufactory; no place where they conduct a distinctly manufacturing business. I think they own harrows now. I think they own material, which was being manufactured for like something of two hundred harrows. It may be they have been shipped, but they have been at work assembling them and putting them together. Part at Kalamazoo and part in this State. I think the Standard Harrow Company built some of them, and I think the Walker Manufacturing Company built some.

Part of them were harrows which had been heretofore manufactured by Ira J. Hunt of Kalamazoo, some by Williams Manufacturing Company and some by the Walker Manufacturing Company; and I think some others that I don't now recall to mind. It was completing of harrows which the National Harrow Company had bought in parts in one sense; there was part of the material which entered into the construction of the harrows, purchased by the National Harrow Company in various stages of completion, and as I remember we bought some parts, some material for parts and procured castings and malleables, so we could complete and put them in marketable shape, and we sent out parties to sell them, and most of them have been sold in Canada, and part of them shipped.

A non-lever steel frame harrow costs about $6 to $6.25 complete; a wood frame harrow costs about fifty cents less; a steel frame lever harrow costs about $8 to complete.

250 Cross-examination:

I will say that all of the papers, of whatever character that had been signed and executed by parties prior to the decision of Judge Smith were, excepting the separate assignments of patents, which had been made to the New York Company, delivered up most of them to me and were by me delivered to Mr. Warren M. Brinkerhoff and to Edward Norris; before the execution of the papers similar to those shown in Exhibits 1, 2, 3, 4 and 5 in evidence in this case, they were delivered to me to be cancelled and surrendered and destroyed, the arrangement having been made before the execution of the exhibits last referred to, that they should be cancelled, annulled and destroyed in toto. So far as I know there are no other

contracts or agreements between the plaintiff and its predecessor with any parties than the contracts similar to Exhibits 1, 2, 3, 4 and 5, and there are a number of licensees of the company who have never signed any papers to either this plaintiff or its predecessor, and hold a straight license contract similar to Exhibits 1 and 2; there are lever harrow licenses granted in addition to the exhibits before referred to, to come of the licensees. The Osborne contract is a straight license.

Mr. COOKINHAM: I will offer in evidence the statute of the State of Michigan, known as No. 225, of the Laws of 1889, entitled "An act declaring certain contracts, agreements, understandings and combinations unlawful and to provide punishment for those who shall enter into the same, or do any act in performance thereof." I make the proof from joint and concurrent resolutions of the legislature of the State of Michigan, passed at the regular session of 1889, published by authority, from the printed volume by Darius D. Thorp, State printer and binder, which is as follows:

251 Objected to by the plaintiff upon the ground that it is immaterial, incompetent, and not properly proved.

Objection overruled. Exception.

"SECTION 1. The people of the State of Michigan enact, That all contracts, agreements, understandings, and combinations made, entered into, or knowingly assented to, by and between any parties capable of making a contract or agreement which would be valid at law or in equity, the purpose or object or intent of which shall be to limit, control, or in any manner to restrict or regulate the amount of production, or the quantity of any article or commodity to be raised or produced by mining, manufacture, agriculture or any other branch of business or labor, or to enhance, control or regulate the market price thereof, or in any manner to prevent or restrict free competition in the production or sale of any such article or commodity, shall be utterly illegal and void, and every such contract, agreement, understanding and combination shall constitute a criminal conspiracy. And every person who for himself personally, or as a member or in the name of a partnership or as a member, agent or officer of a corporation, or of any association for business purposes of any kind, who shall enter into or knowingly consent to any such void and illegal contract, agreement, understanding or combination, shall be deemed a party to such conspiracy. And all parties so offending shall on conviction thereof, be punished by fine of not less than fifty dollars, nor more than three hundred dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment at the discretion of the court. And the prosecution for offences under this section may be instituted and the trial had in any county where any of the conspirators became parties to such conspiracy, or in which any one of the conspirators shall reside; provided, however, that this section

252 shall in no manner invalidate or affect contracts for what is known and recognized at common law, and in equity as contracts for the 'good will' of a trade or business, but all such con-

tracts shall be left to stand upon the same terms and within the same limitations recognized at common law and in equity.

SEC. 2. Every contract, agreement, understanding and combination declared void and illegal by the first section of this act shall be equally void and illegal within this State, whether made and entered into within or without this State.

SEC. 3. The carrying into effect, in whole or in part of any such illegal contract, agreement, understanding or combination as mentioned in the first section of this act, and every act which shall be done for that purpose by any of the parties or through their agency or the agency of any one of them, shall constitute a misdemeanor, and on conviction the offenders shall be punished by imprisonment in the State prison not more than one year, or in the county jail not more than six months, or by fine not less than one hundred nor more than five hundred dollars, or by both such fine and imprisonment in the discretion of the court.

SEC. 4. Any corporation now or hereafter organized under the laws of this State, which shall enter into any contract, agreement, understanding or combination declared illegal and criminal by the first section of this act, or shall do any act towards or for the purpose of carrying the same into effect in whole or in part, and who shall not within thirty days from the time when this act shall take effect, withdraw its assent thereto and repudiate the same, and file in the office of the secretary of state, such refusal and repudiation under its corporate seal, shall forfeit its charter and all its rights and franchises thereunder.

SEC. 5. It shall be the duty of the attorney general upon
253 his own relation or upon the relation of any private person, whenever he shall have good reasons to believe that the same can be established by proof, to file an information in the nature of a *quo warranto* against any corporation offending against any of the provisions of this act; and thereupon the same proceedings shall be had as provided by chapter two hundred and ninety-eight of Howell's Annotated Statutes, relating to proceedings by information in the nature of *quo warranto* against corporations offending against any of the provisions of the act or acts creating, altering or renewing such corporations, and in other cases.

SEC. 6. The provisions of this act shall not apply to agricultural products or live stock, while in the hands of the producer or raiser, nor to the services of laborers or artisans who are formed into societies or organizations for the benefit and protection of their members.

SEC. 7. It shall be the duty of the secretary of state to cause this act to be published for four successive weeks in some daily paper in each of the cities of Lansing, Detroit, Grand Rapids and Marquette, commencing within ten days after this act shall take effect, and he shall also within the same time cause to be mailed to each of the corporations whose articles of association are on file in his office, a printed copy of this act, with a notice calling special attention thereto.

Approved July 1, 1889."

E. H. RISLEY, recalled.

I made arrangements to purchase and did purchase with the consent of the directors of the plaintiff, a majority of the plaintiff's capital stock, so that at the annual meeting in September, 1893, I voted the majority of the stock of the plaintiff. I sold out the stock to the Standard Harrow Company, and transferred it to the Standard Harrow Company and the Standard Harrow Company now owns it.

254 WILLIAM STRAIT, a witness called and sworn for the defendant, testified as follows:

I reside at Elmira; my business is a manufacturer of rakes, cultivators, files, and spring tooth harrows.

I have been in the manufacturing business over twenty years; manufactured spring tooth harrows I should say seven or eight years. I know the plaintiff, The National Harrow Company.

We do business under the firm name of the Clipper Chilled Plow Company. I knew the National Harrow Company of New York, our company had dealings with that company.

We had some negotiations with the National Harrow Company in relation to becoming licensees or members of the National Harrow Company, and certain papers, contracts, were drawn with that view. It must have been some two or three years ago. I think about 1890. I think we had the negotiations with Mr. E. H. Risley and Mr. Childs. We signed the papers which they had prepared for our company. The papers were left in the hands of Mr. Risley to be passed to the secretary of the National Harrow Company or treasurer, after the executive committee made some decision in relation to the styles of harrows that our company was to be permitted to manufacture. I don't remember as I have ever seen those papers since; I may have seen them in court, but I don't think I ever saw the papers after that. I presume I did see them in the case when it was tried between us and the National Harrow Company before Judge Smith. I never had them in my possession.

After we had left them in Mr. Risley's hands I think we wrote Mr. Risley. We brought suit against the National Harrow Company to return those papers for cancellation. That suit was defended and tried before Judge Walter Lloyd Smith. It was tried probably
255 a month or six weeks after the signing of the papers; about January, 1891. Those papers were put in evidence on that trial. We never received them back into our possession. I have examined both our own business and the office of our attorneys to see if they could be found. I did not succeed in finding them. I never had the originals after they were drawn, in my possession. I have not had the originals in my possession since I left them with you. At that time I understood the contents of the papers. From what I knew of the original papers and from that knowledge I swear that these are copies of those papers.

Q. You swear wholly from recollection of the subject-matter in these contracts and not from verbal copies of these papers?

A. I swear from my knowledge and present recollection.

Q. Now can you tell the first sentence that is in any of those papers from your recollection?

A. No, I presume I can't repeat the contracts. These copies came from Elmira, I think. I don't know where Mr. Cockinham got them. I have read these papers and I swear that these papers are copies.

Plaintiff's counsel asks to strike out that answer, as not responsive to the question.

(WITNESS:) I do. Whether these papers are copied accurately or not, I cannot state, but I think the general matter is correct.

Redirect.

Mr. COOKINHAM:

I did not know that these were handed you by Mr. Collins my lawyer.

Contracts now offered in evidence.

Objected to by plaintiff's counsel, on the ground that the documents produced have not been proved to have been copies of
256 the original agreements, and therefore not competent evidence; that the originals are the best evidence.

DEFENDANT'S COUNSEL: I am entirely aware of what the rule is, but as the case is now presented, the papers are all destroyed.

The REFEREE: You had better mark those papers for identification and make such proofs as you can before putting them in evidence.

Papers marked "Defendant's Exhibits 52, 53, 54 and 55 for identification."

Mr. COOKINHAM: I think I can give the substance in general of the agreements I made at that time with the National Harrow Company, so as to state it orally what the agreement was.

Objected to by the plaintiff's counsel on the ground that the papers are the best evidence.

The REFEREE: I don't think there is any basis for giving this evidence, but I won't pass on the question now, but let you give such proof as you can on the subject.

We never received those original papers for cancellation in our hands or our company's. After the decision of Judge Smith in our case we made some amicable adjustment temporarily with the National Harrow Company.

What I call a float spring tooth harrow is one that is made so that the frame holds the teeth out of the ground so that they will not harrow at a greater depth than set below the frame and has neither shoes nor lever. Shoes and runners are the same. It rides on the teeth until they go into the ground so the frame will strike and float on the ground.

Q. Will you examine Plaintiff's Exhibit "Bement Lever Harrow" and state whether that is what is called a float spring tooth harrow?

257 I am acquainted with that harrow and I would not call that a float spring tooth harrow.

Cross-examination:

We have pending lawsuits at the present time with the plaintiff on account of some harrows which we have built and are still building.

I recollect that when Judge Smith made that decision in the controversy between us and the National Harrow Company of New York. It was some time, probably in January or February, 1891, and as I understand it, judgment was entered in that action in Chemung county. Neither side appealed from the judgment; they acquiesced in the decision of the court. I think that was agreed on when the settlement was made. After that decision and entry of the judgment we adjusted the matter with the National Harrow Company.

I know as a fact, that we did arrange upon some terms of a license for a limited period. I think there was something of that kind, but I know we never recognized anything of that kind. I don't remember what the contracts were; I never considered ourselves members of the National Harrow Company.

I know a tool in the market known as a drag, spike tooth bar. Have known that from my youth up. I have seen these spike teeth or straight teeth drags that have means for adjusting the teeth such as a lever quite recently. They have had them some little time in the market. I should call such a drag a spike tooth float harrow. I never knew of a harrow that the teeth didn't go below the frame to get it into the ground. If the teeth go in the ground and the frame runs along on the ground, I should call it a float harrow. I mean that the word "float" refers to a particular harrow just the same as the word "lumber" refers to a lumber wagon, and a

258 buggy, wagon and a platform wagon refers to other wagons.

Q. That is there are certain understandings in your mind, what constitutes a float drag?

A. No; there are certain kinds of drags that are designated by the word "float."

Q. The word "float" means that it runs along on the ground; it don't matter whether the teeth run in a half a foot or five inches?

A. No, it is a float as long as the frame drags along on the ground. The frames of the harrows never float on the ground.

I have known of wheels being put on harrows for a good many years. There are harrows which have wheels on and they are sometimes called wheel cultivators where they are made in three sections, which is a sort of a combination. The frame of these harrows never floats on the ground, they never come in contact with the ground they are always carried and supported on the wheels. The wheels regulate the depth of the cut.

I think I know of almost all the harrows that Stevens has made.

If you had to add anything like a shoe on a harrow which would enable you to carry the harrow across the field, and when you took the shoe away the frame ran on the ground, I should say it would

be a float harrow when in operation, and not, when you are moving it.

Redirect examination:

Q. Mr. Strait there is what you would call a roller harrow also, describe that?

Mr. RISLEY: I object to that.
Objection overruled. Exception.

A. A roller harrow is one that is made where the rollers
259 project below the frame; there are others made so they project about three inches, and when the teeth are drawn up the rollers are on the ground and support the frame and teeth. These rollers are different sizes; some made four inches in diameter and some six or eight. The roller carries the frame and if you want to harrow less or deeper, it depends on the depth the teeth are drawn below the roller.

I think a harrow constructed so that it is taken away from what would be termed a float spring tooth harrow, is one that has a lever for operating all of the teeth, that is all of the teeth in a section at one time, and that the teeth are regulated as to depth by either a runner or roller; the roller or wheel runs on the ground and regulates the depth in which the tooth is to operate in the soil.

(Paper shown witness.)

This is a letter from Mr. Risley to our firm. I think it is the paper Mr. Risley gave us. I think I have always had it since.

Offered paper and received it in evidence, and marked Ex. "56" S. E. J. The same as Ex. 4, attached to amended answer and printed on page 76.

At the time we negotiated with Mr. Risley and Mr. Charles H. Childs, with a view of becoming a member of the National Harrow Company of New York, they gave us a statement as to prices at which harrows were to be sold. We had no other negotiations with Mr. Childs in regard to the prices than those contained in this letter. We didn't sell any harrows under those prices. We didn't go on under the papers. I don't remember whether we offered any harrows at those prices, and didn't succeed; I don't believe we ever tried to sell at those prices, before we brought the suit. In settling that suit the National Harrow Company paid us $500, and Mr. Risley says they gave us a license and I guess they did.

260 Recross-examination:

The Clipper Chilled Plow Company has made a harrow which had wheels from three to six inches in diameter. We made that two or three years ago; we never put many of these harrows on the market; and by a man by the name of Davis, he is an Elmira man, and I think Sweet at Dansville made some of his harrows that way. That harrow was built ten years ago; eight anyway; I have seen

that harrow in operation. The size of the wheels on it are about six or seven inches across, they are attached near the middle of the harrow. My memory is now there was some sort of an adjustment for making it harrow deeper or less, by adjusting the wheels the harrow could be let into the ground more or less deep, but just the peculiar construction of the harrow I don't remember. Well in fact, I don't know of a great many roller harrows that are in actual use. We never have put out to any great extent, any of our roller harrows, not of the spring tooth harrows, but we use a roller on a spike tooth harrow. We build a roller to a spike tooth. This spike-tooth harrow the rollers are off the ground when the harrow is in operation. When it is working it is a float, and when carried around it is a roller. With the Sweet harrow it is right the reverse; theirs run on rollers in operation. These harrows were manufactured by Sweet eight or ten years ago. I think they were put on the market at that time. I have not seen them in a great many years; they didn't amount to anything particular; that is the harrow didn't have any push. They did meet with sale.

We are now putting out a harrow with a lever on it that raises the frame up and down. That is not part of the time a float and part a shoe; it is a lever harrow with shoes. The shoes cannot be taken up so the frame is down on the ground. They are
261 stationary. The shoes run on the ground, and are rigidly fastened to the harrow frame. They are in connection with the frame, but not strictly speaking a part of the frame. They are riveted or bolted to the frame, and give a clearance below the frame bars.

The REFEREE:

Q. Referring to the "Blaker Lever Harrow Pl'ff's Ex." do you call that a float spring tooth harrow?

A. I should call that a lever harrow.

Q. Is it properly denominated a lever spring tooth harrow?

A. I should not say it was.

Mr. RISLEY:

Q. In that harrow referred to in the last question, the frame bars always run on the ground, whether the teeth are in or out?

A. No, when the teeth are out of the ground the bow runs on the ground. The frame would prohibit the teeth from harrowing at a greater depth than set below the frame. The frame draws on the ground. That harrow outside of the lever in operation is a float harrow.

The REFEREE: A harrow isn't a float if it has a lever?

A. A lever probably wouldn't determine it.

Mr. RISLEY:

Q. That wouldn't determine it?

A. No, I don't think it would; I think a harrow in order to be taken away from a float harrow would need to have something under it to support the frame off the ground all the time. The word

"float" refers to a certain kind of a harrow; the word "lever" refers to a certain kind of a harrow and the word "wheel" refers to a certain kind of a harrow; just where to draw the line to designate between them, it is a little hard.

262 I think I am capable of formulating language which would exactly define, under all circumstances, the difference between a float harrow and any other kind of a harrow. I don't think the word "float" is a proper thing to use anyway; a float harrow is one where the frame of the harrow passes over the ground. I define a float harrow as a harrow that rides on the ground and regulates the depth of the cut.

Q. That has nothing to do with it?

A. Yes, that has everything to do with it.

The difference in the depth of the cut of the teeth does not determine whether a harrow is a float harrow or non-float harrow. I would not consider from my standpoint, any harrow which the frame draws on the ground, when the harrow is in operation, a float harrow. A harrow with a lever I wouldn't call a float harrow; that is within the meaning that is generally put to that word. A harrow that is made with nothing but the frame to keep the teeth out of the ground, would in my opinion be called by the usages of that word a "float harrow."

If a harrow was a plain harrow and had nothing but the frame and teeth, that would according to the usages of the word "float" be a float harrow; if it had in connection with it a lever and shoe, it would not be called a float harrow.

ADOLPHUS I. SIMMONS, a witness called and sworn for the defendant testified as follows:

I reside at Utica and am at present receiver of the Eureka Mower Company. Edward Norris was manager of the Eureka Mower Company prior to its going into the hands of a receiver; he died on the 7th of February, 1893.

263 When I became the receiver I found in the vaults of the Eureka Mower Company a quantity of books and papers, pertaining to the business of the National Harrow Company. At this distance of time I cannot tell what they were. I delivered them to Mr. Charles H. Childs and Mr. Brinkerhoff, and I think there was a third person with them, whether it was Mr. Stevens or some one else, I cannot tell. To the best of my recollection, it was the latter part of February or early in March. I have his receipt. There are no papers left there pertaining to that subject, to my knowledge, I have not seen any since. I intended to turn them all over to them. There was some blank forms of contracts, or licenses rather. I think they were like the last license granted to the Eureka Mower Company. And the license granted to the Eureka Mower Company was the regular license of the National Harrow Company, such as other licensees took. The same in form, I believe as those blanks. I know it was on one of the blanks.

DE WITT C. MARKHAM, a witness called and sworn for the defendant, testified as follows:

I live in Port Lyden, Lewis county; I am sheriff of Lewis county. I have had to do with the manufacture and sale of agricultural implements, including spring tooth harrows:

I was interested in the manufacture for the Eureka Mower Company of what is called the Eureka harrow. My position in connection with the company was superintendent. I had entire charge of the manufactory. I was interested in the invention of any spring tooth harrows.

I invented and built what is called the Eureka harrow manufactured by the Eureka Mower Company, and there was, I had two or three other patented harrows called the "Yankee harrow," and some others. I am familiar with the spring tooth harrows that are now manufactured and have been for the last four or five years.

In the way I should estimate a float spring tooth harrow
264 in the trade would be, a harrow with teeth that are fastened rigidly to the frame, and the frame is held independently by the teeth; that would be my explanation of a float spring tooth harrow; there are some here that I would term a float spring tooth harrow and some are not. I should call Plaintiff's Ex. "Bement Lever Harrow," which you show me a lever harrow. I should say it would not be termed in the trade, a "float spring tooth harrow;" what I think of it.

A spring tooth harrow having a lever with shoes, or runners or wheels to bear up the frame, when it was transported from place to place, not in operation, and which shoes, wheels or runners measure the depth of the cut, when the harrow was in operation would not be considered in the trade a float spring tooth harrow.

I am not interested in any way in either the Standard Harrow Company, the National Harrow Company or any of the parties interested in the manufacture of spring tooth harrows.

Cross-examination.

By Mr. RISLEY:

I am a farmer now. I was born and brought up on a farm. I ceased to superintend the operation of the Eureka mower six years this fall, and since that time I have been running a farm. I worked for the Eureka Mower Company almost five years, I think. Spring tooth harrows have been sold on the market, I can't tell how long exactly; a good many years. I had to do with the business first, when I was superintending the Eureka Mower Company. My Yankee harrow was manufactured by John J. Frye of Portland, Maine. I know the fact that Frye was sued and enjoined in the manufacture of that harrow.

I don't think I ever heard "float" connected with anything excepting a spring tooth harrow.

265 The purpose of a harrow in agriculture is to fit the ground for seed, to sow or plant it. I have used what they call a peg harrow for putting seed in the ground. I think I have seen a

lever on a peg tooth harrow on exhibition at fairs. I would call a peg tooth harrow with a lever on it, a "peg tooth lever harrow." And a spring tooth harrow I would call that a lever spring tooth harrow, and I think that would be a proper designation.

I think the word "float" is a very poor word; a very poor definition. What I would understand it to mean, would be a harrow before the lever was thought of; they were designated as floating spring tooth harrows, when they were made with the teeth bolted rigidly with no means of adjusting them. I have seen such a harrow, with the teeth bolted rigidly to the frame. It is right over there now. The Walker.

I think I have seen a Garver harrow. I don't know as I ever saw it in operation.

The Eureka harrow which was manufactured; I would call that a harrow that the teeth could be adjusted by loosening the clip; and shifting the teeth. I should call it a float harrow, just what I understand the word "float," as applied to harrows, means a harrow like what we called the "UTK" I should call that a float harrow. I should not call any harrow which employed spring teeth where the frame runs along on the ground, where the teeth were independently adjustable on the frame, so as to regulate the depth of the cut of the teeth, a float harrow. I should not call any harrow where the frame runs on the ground a float harrow.

The teeth of the Eureka harrow were adjustable on the frame bars. The frame, when the harrow was drawn in the soil, did not float and run along on the ground. No part of the frame bar struck the ground without the teeth went into the ground six or
266 eight inches. Supposing they went in the ground then, of course it would go on the bar. I considered it a float harrow.

I meant a few moments ago, in saying, that I would not consider a harrow, where the frame run along the ground having curved teeth independently adjustable on the frame a float harrow, that you can turn them up so they will not do any business at all, and the object of the spring teeth is to harrow with the teeth and not with the frame; you can adjust those teeth so they will not do any business; the Eureka harrow was adjusted in such shape, so they stood six or eight inches from the ground, when it stood on the floor, and by turning them on the seat, you would turn it so the frame would rest right on the ground.

The characteristics in the Eureka harrow which made it a float harrow were that the teeth were bent different from other teeth; that is the shape of the teeth were so as to set the frame up higher; that was one of the characteristics; most of the frames run lower to the ground than the Eureka harrow; it was so with the Yankee harrow; there was a difference in the shape of the teeth. That was about all.

I don't think I would determine whether a harrow was a float or a non-float harrow by the curve of the teeth. I say the frame should be out of the ground; not to drag on the ground. I mean a harrow that is above the ground, not in operation would be

my understanding of it; nothing to hold it up excepting the teeth. I think the Exhibit "Walker Harrow" would be termed a float harrow.

I should think Exhibit "Pitts Harrow No. 1," would be called a float harrow, whether the frame runs an inch higher or lower, would not determine whether a harrow was a float harrow or non-float harrow. I don't know as it would so it would be up high enough so it would not do the harrowing with the frame. I should
267 call a harrow with the frame above the ground a float harrow.

I don't know that the frame bars of Exhibit "Walker Harrow" run on the ground (witness looks at harrow); the bars here do not run on the ground. It does make a difference whether cross-bars or longitudinal bars run on the ground whether it is a float harrow; that would be my opinion.

The distinguishing feature of a float harrow would be where the cross-bars are not dragged on the ground. I have known such a tool in the trade as a wheel cultivator or wheel harrow. In these harrows I don't know but some of the frame bars to which the teeth are attached are mounted on an axletree which is carried by wheels; we have one that is called the "Warner" harrow, where there are three sections to the harrow; the frame is up a foot or more from the ground. I would not call it a float harrow. It is carried on wheels; there is a distinction between a wheel harrow and a float harrow.

Q. Would it in your impression make any difference whether the teeth on the bar was adjustable or non-adjustable in reference to whether it was a float or a non-float harrow?

A. I don't know as it would be so considered; perhaps it would not be considered in the trade.

Redirect examination:

If the harrow frame is carried by wheels, shoes or runners I should not say it was a float spring tooth harrow.

Recross-examination:

I should say the frame of the Walker harrow runs on the teeth when the teeth project below the frame and do the work; and that would depend on the ground. If the teeth went in deep enough the frame would be on the ground. In Exhibit "Walker Harrow" there are two frame bars, running in the direction of the line
268 of draft of the harrow under each section of the Walker harrow; but I should say that was a part of the frame. When that harrow is put to use in freshly plowed soil, in my opinion the frame bars of that harrow would run on the ground, in some soil and in some it would not. In soft soil where the frame bars run on the ground, that kind of a harrow I would call a float spring tooth harrow, I think. I wouldn't say, that all harrows where they had bars or shoes running along on the ground, were not float harrows.

Not if the bars or shoes run on the ground, I should say they were not float harrows. It depends on the ground whether the Walker is or is not a float harrow; in some ground it would be up two or three inches from the ground. I would say the condition of the soil determined the question whether it was a float or non-float. I suppose it is a float harrow just the same where it is not adjustable. The Eureka harrow runs six or eight inches below the frame bars, so the frame when it was in hard soil, runs clear from the ground and that makes it a float harrow. I would call it so.

If you got on soil where the frame run on the ground all the time when it was working it would be the same harrow; it would still be a float harrow.

In point of fact, the depth of the cut of the teeth has nothing to do with it, whether it is a float or non-float; if the frame is set high enough so it didn't work on the ground. If the teeth were adjusted so that the frame was down on the ground all the time. I would not call it a float where the frame dragged on the ground all the time. Perhaps I have not a very clea idea of what is the difference between a float and a non-float. I think I have given a definition of what distinguishes one from the other; maybe I am not clear. My idea of the distinction would be as I said before, a harrow in
which is held independently, the frame above the ground by
269 the teeth and not adjusted by any lever or shoes; that would be my explanation of a float harrow; and a non-float harrow would be where the frame rests on the ground; and then those that are carried on shoes or wheels would be a non-float harrow. I don't think I would call the frame which was carried under the axle, which is supported by wheels a float harrow. The frame bars in such a harrow as I have described are all the time above the ground unless the soil is soft. For ordinary purposes, they never come in contact with the ground; it is held up by the wheels. I should call it a wheel spring tooth harrow. I think this one was called the Warner wheel spring tooth harrow. It is the only one I have used. I have seen a good many different kinds. I should not call the "Ajax harrow" a lever harrow when the lever was off. If you took the lever off the "Ajax harrow" and fastened the cross-bars stationary, that would be probably designated a float harrow.

Q. Assuming that the cross or teeth bars in the "Ajax harrow" were rigidly held in their position so that the point of the teeth projected four or five inches below the tooth bars, what would you say that such a harrow would be termed in the trade as?

Mr. COOKINHAM: I object to it as incompetent, immaterial and that the question is so shaped that the witness cannot determine whether he means excluding the lever, or leaving the lever upon the harrow.

Objection overruled. Exception.

A. A spring tooth harrow.

Mr. RISLEY:

Q. Would it be a float harrow?

A. I don't know whether it would or not.

Q. Would it in your mind make any difference whether
270 the teeth projected below the frame bar six or eight inches in determining whether it was a float harrow or not?

A. I don't know as it would.

Redirect examination:

In 1891, there were no spring tooth harrows manufactured and on the market having a lever. I think '92 was the first I ever saw. There were no harrows on the market at that time, or manufactured to my knowledge, which had a runner or a shoe which carried the frame of the harrow so high from the ground, that the teeth would not operate that I know of. I never saw any harrow, at that time, except wheel harrows, in which the teeth could be in gangs or sections elevated, so that they would not operate, when the harrow was drawn upon the ground. If a lever was so attached to the Walker Exhibit, and the teeth so fastened to the frame that they could all upon one section be elevated, so that the frame could be drawn upon the longitudinal bars and the teeth not operate, I should not call it a float spring tooth harrow. I should call it a lever harrow.

Recross-examination:

The lever has no other office or function than that of simultaneously adjusting the teeth in each section, and to hold them, that is all. Whether the teeth were fastened to the frame bars so as to be independently adjustable or whether they were simultaneously adjustable, the harrow would do, in operation exactly the same work, and would operate in substantially the same manner on the soil, if they were set the same both ways. All spring tooth harrows have to have their teeth so set that they will not jump; of course there can be too much of a curve in under. If the teeth were curved too much in under I should think it would jump around. All spring tooth harrows must be arranged so that the point of the teeth comes in contact with the soil for the purpose of stirring
271 it. The average depth which the teeth are ordinarily set to cut on these spring tooth harrows depends a great deal on the ground. The average depth which farmers plow their land is anywhere from four to six inches. It depends a good deal on the location and soil. I should say all harrows run more shallow than they plow.

GEORGE B. DAVISON, a witness called and sworn for the defendant, testified as follows:

I live in Utica; am connected with the Eureka Mower Company. I have been with this company eighteen years. As general agent until the last five years in the western territory and Pennsylvania. The last five years I have been connected more particularly with the shops and have charge of the traveling men; and during this time I have had to do with spring tooth harrows. Manufacturing

and selling and inventing two or three different harrows that I have invented, I have been familiar with the spring tooth harrow for sixteen or eighteen years, but not so closely allied with it as I have been the last six or seven years. I am familiar with harrows on the market and that have been on the market five or six years What is known to the trade as a float spring tooth harrow is a harrow constructed with a rigid frame, with the teeth attached to it by bolt or clip. I think that covers a float spring tooth harrow, in my estimation. A spring tooth harrow constructed so that the frame rests upon a shoe, or runner or wheel, which measured the depth of the cut and upon which the frame could be transported from field to field, would be a float spring tooth harrow, unless it was under the control of the operator at will, while at work. I mean under control of the operator at will by lever or attachment which he could draw it upon its shoes, wheel or frame, or upon the
272 back of the teeth. Bement's Exhibit "Ajax" Lever Harrow would not be known as a float spring tooth harrow to the trade.

Mr. Martin subpœnaed me to appear in this case to testify. I don't know whether he is or is not connected with Cookinham & Sherman; I have seen him in there. I don't know as he has a desk in that office. I have been in Cookinham's office the last six or seven months twice, I guess; maybe three times. I have been in the employ of the receiver since he took possession of the Eureka Mower Company. Am not now in his employ altogether, but in part. The word "float" as applied to harrows signify to my mind a harrow that is so constructed, while in operation, can't be controlled by the operator. Webster defines the word "float" as something that moves on the surface, as a board would float on the water. The term "float" as applied to harrows would designate that kind of a harrow that is not under the control of the operator. This name "float" was applied to harrows years ago. The word only when applied to harrows years ago, meant a construction of harrow where the frame bars, some portion of the time run on the ground; and when the lever came into use, they termed them lever harrows. Whether a harrow is a lever harrow or float harrow the work they do, when in operation is substantially the same kind in character. The Walker harrow is a float harrow. The harrow marked "Pitts Harrow No. 1" is a float harrow. The Pitts No. 2, I call a lever harrow. The Pitts Nos. 1 and 2, when the harrow is in use, perform essentially the same operation. One rides the ground the same as the other.

Redirect.

By Mr. COOKINHAM:

If a lever was attached to the Walker harrow, and the teeth were so attached to the frame that they could be controlled by the operator, I would then call it a lever.

273 If the lever was attached to the Pitts No. 1, and the teeth were so attached to the frame that it would be under control

of the operator when it was worked, it would not be a float spring tooth harrow. The Pitts Exhibit No. 2, is not a float spring tooth harrow.

I am in the employ partially of the receiver of the Eureka Mower Company; I have charge of the past-due paper and sale of the goods. That past-due paper does not go through the hands of Cookinham & Sherman, as attorneys for the receiver, it is done in a different way, through other attorneys.

HENRY D. BABCOCK, a witness called and sworn for the defendant testified as follows:

I reside in Utica, a part of the time; my family is in Leonardsville, and I am general manager for the Standard Harrow Company. Its business is manufacture and sale of riding and walking cultivators, disc harrows, peg harrows, harrow teeth and spring tooth harrows. It is located at Utica. Thev are extensive manufacturers of spring tooth harrows. We sell spring tooth harrows in the United States, and largely by traveling men. The officers of the Standard Harrow Company are:

The president is Le Roy W. Stevens of Auburn; vice-president is Frank J. Henry, Kalamazoo, Mich.; secretary and treasurer is Charles H. Childs, Utica; and the general manager is H. D. Babcock. These are all directors except myself. Robert S. Williams of the Oneida national bank, and George S. Dana and Mr. E. L. Wells, and I think Mr. Risley was at one of the meetings. I can't state that he is a director; he was at the meeting. I can't state whether he voted or not to my own knowledge. I think Mr. Scott of Dayton, Ohio, is a director; I can't give the price at which the Standard Harrow Company has sold harrows during the last year.

274 I have the means at the office for ascertaining what the prices are. I will bring in the prices this afternoon. We make written contracts with purchasers of harrows; they contract at stated prices for spring tooth harrows; our traveling men take the contracts with customers and the original is sent to the office for approval and is not binding until approved by me at the office. Invariably all these contracts are made at prices fixed by the National Harrow Company. When the settlements are made by the customers, if the account is paid before June 10th on spring sales, he is credited with 10 % on account of purchasers and on fall sales he is credited with 10 % if paid October 10th.

I know that our traveling men have not made any different terms with customers, so far as I know. I know we never agreed with customers to take a certain amount of harrows, and if they didn't succeed in selling them, that our traveling men should *in*sist in selling them. They have made no such agreement with my knowledge. They have not to my knowledge assisted any of our customers in disposing of spring tooth harrows purchased of the Standard Harrow Company.

The counsel for the plaintiff withdraws all objections to the proof, if defendant can show that any licensee of this plaintiff has violated any of the terms of his license contract with the sanction of the company and with its approval.

Cross-examined:

The Standard Harrow Company has never sold or settled for or compromised in any way or manner by which any person, firm or corporation who bought spring tooth harrows of the company has been allowed any rebate, discounts or allowance in any way, shape or form, except the rebate allowed by the license contracts and prices fixed by the plaintiff. The company has never in any
275 way permitted to its knowledge or its approval either expressly or impliedly allowed any traveling man to make any rebates, discounts or reductions to any customer who has bought harrows, other than such as are allowed by the terms of the license contract.

The Standard Harrow Company has never been licensed to build any harrow, direct by this company, except what is purchased of others. The lines of harrows which we are now building, the entire line are licensed goods. We make sixteen different lines and styles of harrows, I think.

Q. And how many styles of lever harrows do you build?

Mr. COOKINHAM: I object to this as not cross-examination.
Objection overruled. Exception.

A. Six, I think.

Mr. RISLEY:

Q. What proportion of harrows which the Standard Harrow Company have marketed, have been lever float spring tooth harrows?

Mr. COOKINHAM: That I object to as incompetent, immaterial and not cross-examination.
Objection overruled. Exception.

A. I think about ninety per cent. That is my impression that there is about ninety per cent. And the balance of them are non-lever spring tooth harrows.

The prices at which harrows are sold from and including the 12th day of September, 1894, have been reduced by the plaintiff, and a new schedule price has been furnished us as licensee. That schedule of prices, reduces the price of all harrows, except lever harrows, and the price of lever harrows remains the same in the present year as it did in the year 1893–'94.

The Standard Harrow Company has paid a dollar royalty per harrow. It paid $2,000 of this in advance of when it was
276 due. The balance has been paid. The royalty was paid by check to the order of the National Harrow Company. There was no allowance of any kind made from the dollar royalty.

THOMAS M. OSBORNE, a witness called and sworn for the defendant, testified as follows:

I live in Auburn, N. Y., am president of D. M. Osborne & Company manufacturers of harvesting machinery including spring tooth harrows. Have been manufacturing spring tooth harrows for three years, I think. Our company has contracts with the National Har-

row Company in regard to spring tooth harrows. They have had three in all. I have these contracts with me. I have the contracts in my hand. We are in no other way interested with the National Harrow Company than by these contracts. We have had no other contracts of any other kind with them except these. The first contract that was made between us and the National Harrow Company was dated November 29, 1892. D. M. Osborne & Company did not pay to the National Harrow Company any royalty upon that contract for harrows manufactured and sold. It was revoked March 21st, 1893, by myself as president of D. M. Osborne & Company, the contract although bearing date November 29th, 1892, was in fact not executed by me or by the National Harrow Company until a later date. It was signed by the National Harrow Company on the 18th of November, 1893, and by D. M. Osborne & Company on the 17th of November, 1893. During the time between the cancelling of that contract and the making of the next contract we sold harrows without any agreement with them. The next contract was made December 6, 1893. This contract states all the agreement between the parties both in regard to the past and the future, during the year commencing December 5, 1893, and ending December 5,
277 1894, our company sold more than three thousand spring tooth harrows.

It is agreed that the stenographer shall here copy the prices fixed by the National Harrow Company, as appearing in the duplicate of the Osborne contract.

Lever Harrows and Frames.

	Complete harrows.	Complete harrow frames.
14 teeth	$13.50	$10.50
15 "	13.50	10.50
16 "	14.00	11.00
17 "	14.50	11.25
18 "	15.00	11.50
19 "	15.50	12.00
20 "	16.00	12.50
22 "	17.00	13.00
23 "	17.50	13.50
24 "	18.00	14.00

Steel Frame Non-lever Harrows and Frames.

	Complete harrows.	Frame harrows.
14 teeth	$12.50	$9.50
16 "	12.50	9.50
18 "	13.50	10.00
20 "	14.50	11.00
22 "	15.50	11.50
24 "	16.50	12.00

Wood Frame Plated and Plated Frames.

	Complete harrows.	Harrow frames.
14 teeth	$11.00	$8.00
16 "	11.00	8.00
18 "	12.00	8.50
20 "	13.00	9.00
24 "	15.00	10.00

278 *Wood Frame Plain Harrows and Frames.*

	Complete harrows.	Harrow frames.
14 teeth	$10.00	$7.00
16 "	10.00	7.00
18 "	11.00	7.50
20 "	12.00	8.00
24 "	14.00	9.00

Spring curved teeth, twenty-five cents each.

Any licensee of the National Harrow Company may contract with not more than two transfer houses or sales agencies, in any State to sell harrows to dealers.

All sales to dealers shall be made on blank orders furnished by the licensee, and at the prices and on the terms existing as hereby modified.

That two dollars per harrow shall be the maximum price paid by any licensee for selling through said sales agents, such amount to cover the cost of selling, storing and transferring the harrows.

That no rebate or commission shall be allowed on the harrows retailed by said sales agents, but such harrows shall be settled for at the prices and on the terms established.

That the licensee shall not employ any party outside of their regular working force to sell harrows, and that the price of harrows, harrow frames and teeth shall be the prices hereby established, and that no harrows, harrow frames or teeth shall be sold at a less price than that herein named, except in case of jobbers, of whom there shall not be more than three to each licensee in any one State, who buy not less than one hundred harrows complete in one order and in one shipment, and on subsequent orders during the season, and on such only, a rebate of two dollars may be made on each complete harrow from the prices mentioned therein, on which freight
279 may be allowed to the freight station in the city or town where said jobber has his office.

All such jobbers must agree to sell to the retail trade at the prices herein established, subject to cancellation for infraction of the above rule, and the harrow teeth may be sold to jobbers of harrows at five cents per tooth less than the prices herein established. These changes shall not apply to a licensee who does not request such changes and consents thereto.

Defendant concedes it failed to show that D. M. Osborne & Company sold harrows at less than license prices.

I did not see Mr. Arthur O. Bement in our office and did not meet him at the time. Mr. Metcalf, treasurer of D. M. Osborne & Company and myself represented D. M. Osborne & Company. I will correct my answer and state, I recollect there Mr. Bement once in the course of negotiations, when the full committee came to the office of D. M. Osborne & Company, but the greater part of the negotiations were carried on by Mr. Childs and Mr. Brinkerhoff, on the part of the National Harrow Company. Mr. Metcalf and myself on the part of D. M. Osborne & Company.

Mr. RISLEY: The plaintiff offers in evidence contract of November 29, 1892, signed November 19, 1893, between the plaintiff and Osborne & Company.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant, and a reopening of plaintiff's case.

Contract marked Pl'ff's Ex. 59.

Objection overruled. Exception.

Mr. COOKINHAM: I offer in evidence a letter dated, Utica, February 20, 1891, addressed to E. Bement & Sons, Lansing, Michigan, and written and sent by Edwin H. Risley.

280 Law office of Risley & Perry.

UTICA, N. Y., *February* 20, 1891.

E. Bement & Sons, Lansing, Mich.

GENTLEMEN: On the tenth day of November last the Clipper Chilled Plow Company of Elmira signed the contracts and left them with myself, in escrow, to be delivered when the executive committee should decide to license them to manufacture a steel frame harrow, which they had not heretofore manufactured. Before the committee acted the Clipper Chilled Plow Company served notice with the bringing of a suit against the National Harrow Company to have their contract declared inoperative. The cause was tried at Binghamton, N. Y., in January. On Monday last, the judge handed down his decision which vacated the contracts on the ground that they were in excess of the corporate powers of the company and that they were in restraint of trade, and therefore void. The case will be appealed and heard at an early date, and we believe that the decision of Judge Smith will be reversed. In the meantime all agents and licensees of the National Harrow Company will hold their prices and go on with the business as heretofore. The executive committee will meet on Wednesday next. You will be notified of their action.

Yours truly, EDWIN H. RISLEY."

Mr. COOKINHAM: The next one is a letter which I offer in evidence dated February 28, 1891, written by Edwin H. Risley to E. Bement & Sons.

281 "UTICA, N. Y., *Feb.* 28, 1891.

E. Bement & Sons, Lansing, Mich.

GENTLEMEN: I am directed by the president of the National Harrow Company to inform you that the controversies to which previous

reference has been made, between the company and the Clipper Chilled Plow Company and the Buffalo Pitts agricultural works, have been adjusted to the satisfaction of parties in interest, and hereafter above companies will market their harrows at uniform prices under the label and license of the National Harrow Company.

Yours truly, EDWIN H. RISLEY."

Mr. COOKINHAM: I want to offer in evidence letter written by defendants to Charles H. Childs, president, and sent about April 20, 1891.

Mr. COOKINHAM: The letter reads as follows:

"APRIL 20, 1891.

Chas. H. Childs, pres., Utica, N. Y.

DEAR SIR: We are just in receipt of a copy of the Aroostook Pioneer, dated April 17th, 1891, which we send you under another cover. You will observe that there is an advertisement in it of A. L. & E. F. Gross of Lewiston, Me., in which they propose to sell harrows at a very low figure, as follows:

16-tooth, for single harrow	$13 00
18-tooth	14 00
16-tooth, in lots of five	12 50
18-tooth	13 50
16-tooth, in lots of ten	12 00
18-tooth	13 00

We do not know what the Perfection spring tooth harrow is but our impression is from the cut that it is a Chase-Taylor har-
282 row. You possibly may know in regard to it. We wish you would take this matter up at once and ascertain what there is about it. It is having a decidedly unpleasant impression upon our agents in New England. If the matter is as stated it looks as though there was something that needed the attention of the Nat. Harrow Co. Please let us hear from you at once in regard to the matter and say if you know anything about it.

Yours truly, E. BEMENT & SONS.
G. W. BEMENT,
Sec. and Treas."

Mr. COOKINHAM: I offer in evidence letter of Chas. H. Childs in answer to the one just read. This letter is dated April 22, 1891.

Mr. COOKINHAM: On the letter-head of the National Harrow Company.

"E. Bement & Sons, Lansing, Mich.

GENTLEMEN: I am in receipt of your- of the 20th inst., and also of the Aroostook Pioneer paper published at Houlton, Me., containing the add. of A. L. & E. F. Gross, offering Perfection spring tooth harrows at a very low price. Had not before heard of this so — not understand what it means, the 'Perfection' is a new harrow to the

writer. Will do whatever possible in the way of investigation. A. L. & E. F. Gross are located at Lewiston, and their advt. says 'Harrows delivered at Houlton' which is in another part of the State. This looks a little strange.

Yours truly, CHAS. H. CHILDS."

Mr. COOKINHAM: Now I offer from the session laws of the State of New Jersey the title page of which reads as follows:

"Acts of the 112th legislature of the State of New Jersey and
283 44th under the new constitution. Trenton, New Jersey. MacCrellish & Quigley, printers, 1888."

I offer chapter 80, which is an amendment to the corporation law of the State of New Jersey. So you want this, Mr. Risley?

The REFEREE: I will receive it.

An act to amend an act entitled "An act concerning corporations," approved April seventh, one thousand eight hundred and seventy-five.

1. Be it enacted by the senate and General Assembly of the State of New Jersey, That the tenth section of the said act, and which section was amended by chapter seventy of the laws of one thousand eight hundred and eighty, be and the same is hereby amended to read as follows:

10. And be it enacted, That it shall be lawful for three or more persons to associate themselves into a company to carry on any kind of manufacturing, mining, chemical, trading or agricultural business, agricultural fairs and exhibitions for the encouragement of competition in agriculture, horticulture, breed of stock and development of speed in horses; the transportation of goods, merchandise or passengers, upon land or water; inland navigation; the building of houses, vessels, wharves or docks or other mechanical business; the reclamation and improvement of submerged lands; the improvement and sale of lands; the examination, insurance and guaranty of the title to lands; the constructing, maintaining and operating (except in a town or city in which water works are established and owned by the corporate authorities) works for the special purpose of supplying water for extinguishing fires in mills, factories, manufacturing establishments, and other buildings; the damming of rivers and streams, including the storage, transportation and sale of water, and water power and privileges, with the right to take rivulets, raceways and lands, and erect and maintain dams, reser-
284 voirs, raceways, mills, manufactories and other erections and lease, mortgage, sell and convey the same, or any part thereof; the making, purchasing, and selling manufactured articles, and also of acquiring and disposing of rights to make and use the same; the renting buildings and steam or other power therewith; the cutting and digging peat, stone, marl, clay or other like substance, and dealing in the same, manufactured or unmanufactured, or any wholesale or retail mercantile business, or any lawful business purpose

whatever, upon making and filing a certificate in writing of their organization, in manner hereinafter mentioned; provided, that nothing herein contained shall be construed to authorize the formation of any insurance company (except companies for the insurance of guaranty of the title to lands or any estates or interests in lands), banking company, savings bank or other corporation intended to derive profit from the loan and use of money, nor of any railroad company, turnpike company or any other company which shall need to possess the right of taking and condemning lands, except for the damming of rivers and streams, and for the purposes pertaining thereto, as hereinbefore specified; and further provided, that this act shall not apply to any river or stream of a less width or volume of water than the Delaware river, ordinarily, at Phillipsburg, in this State, below its junction with the Lehigh, nor to any river or stream below the head of tide-water in the same.

2. And be it enacted, That this act shall take effect immediately.

Approved February 29, 1888."

Mr. RISLEY: The plaintiff admits that the Farmers' Friend Manufacturing Company was a corporation doing business at the city of Dayton in the State of Ohio. Under what law they were incorporated I do not make an admission in reference to.

285 Mr. COOKINHAM: I offer in evidence the certified copy of the certificate of incorporation of the Walker Manufacturing Company of Moravia, N. Y. Certificate filed January 3d, 1890.

Received and marked Exhibit 129, U.

Mr. COOKINHAM: I offer in evidence a certified copy of the certificate of incorporation of the Pitts Agricultural Works, of Buffalo, N. Y.

Certificate filed Nov. 2d, 1877.

Received and marked Exhibit 130 U.

Mr. COOKINHAM: I now offer in evidence the certified copy of the certificate of incorporation of the Syracuse Chilled Plow Company, of Syracuse, N. Y., certificate filed January 23, 1879.

Marked Exhibit 131.

Mr. COOKINHAM: I offer in evidence certified copy of the certificate of incorporation of the Herndeen Manufacturing Company, of Geneva, N. Y.

Filed March 2d, 1888.

Received and marked Exhibit 132, U.

Mr. COOKINHAM: I offer in evidence the certified copy of the certificate of incorporation of the Eureka Mower Company, of Utica, N. Y.

Received and marked Exhibit 133, U.

Mr. COOKINHAM: I now offer in evidence a certified copy of the record in the case of William Strait, Elijah B. Smith and Hezekiah G. Mix, against Edwin H. Risley, Charles H. Childs, Edward Norris and the National Harrow Company.

Received and marked Exhibit "134."

Mr. COOKINHAM: Now I offer in evidence depositions taken under an open commission to William A. Matteson, commissioner, at Lan-

sing, Mich., commencing on the 22d of January, 1895. A commission issued by the clerk of Oneida county in pursuance of an order of the special term made the 7th day of January, 1895. The
286 commission bears date the 15th day of January, 1895.

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
vs.
E. BEMENT & SONS.

Testimony taken before William A. Matteson, Esq., commissioner, duly appointed by virtue of an order of this court, made herein at a special term thereof, held in the city of Utica, N. Y., on the 7th day of January, 1895, and of the commission issued thereunder, said testimony being taken at the Downey house, in the city of Lansing, commencing on the 22d day of January, 1895.

Appearances: Edwin H. Risley, Esq., for plaintiff and H. J. Cookinham for defendant.

ARTHUR O. BEMENT, called as a witness on behalf of defendant, and sworn, testified as follows:

Q. Mr. Bement where do you live? What is your occupation and official position, and how long have you been engaged in the business in which you are now engaged?

A. I live at Lansing, am engaged in manufacturing stoves and agricultural implements, I am president of the corporation of E. Bement & Sons, and have been engaged in my present business twenty-five years.

Q. Does your company, the defendant, manufacture spring tooth harrows, and if so, how long has it been engaged in that business?

A. It does, and has made spring tooth harrows since 1879.

Q. Are you familiar with the business of manufacturing,
287 and dealing in spring tooth harrows, and have you been for the period of time mentioned by you, viz., since 1879?

A. I have been, and am now.

Q. Do you know the plaintiff, and have you any official connection with it, or have you ever had any official connection with it, and if so, when and what?

A. I know the plaintiff, and have had official relations with it, but have not now. Although I have noticed my name as one of the directors of said company, but have never had any official notice of the same, nor have I had any business in connection with said office, nor have I accepted the same on the last election.

Q. What position, or positions, did you formerly hold in connection with the plaintiff?

A. I was formerly a director, and first vice-president.

Q. Were you one of the organizers of the National Harrow Company, of New York, the predecessor of plaintiff?

A. I cannot say that I was, but had relations with the company soon after its organization.

Q. What were the first relations you had with the National Harrow Company, of New York?

A. There was a combination of manufacturers of spring tooth harrows who sued E. Bement & Sons for infringement of patents. The litigation was kept up for some time with varying success until finally at Cincinnati, before Judges Jackson and Brown, the combination got so severe a blow that they asked us to let up and go into an amicable arrangement, whereby all the manufacturers, who were prominent in spring tooth harrow manufacturing could get together and form a combination on prices and control the market within the limits of those who were at that time in the manufacture of spring tooth harrows.

288 Q. Who were the persons that had before this decision referred to by you, been doing the suing also referred to by you?

A. The D. C. & H. C. Reed & Co., Stevens & Son, C. H. Childs & Co., Olin & Co., Taylor & Henry, and Lawrence & Chapin.

Q. At the time of the decision referred to by you, made by Judges Jackson and Brown, were there other manufacturers of spring tooth harrows in the United States than those you have mentioned?

A. There were.

Q. Who were they?

A. The Eureka Mower Co., Childs & Jones, Herendeen Mfg. Co., the Pitts Agricultural Works, of Buffalo, Syracuse Chilled Plow Co., Clipper Chilled Plow Co., of Elmira, N. Y., Hench & Dromgold, Du Wayne B. Smith & Co., of Utica, McSherry Mfg. Co., Farmers' Friend Mfg. Co., Geo. Sweet & Co., L. C. Lull & Co., of Kalamazoo, D. O. Everest & Co., of Kalamazoo, Williams Mfg. Co., Walker Mfg. Co.

Q. Can you now name any other persons who in 1890 were manufacturers of spring tooth harrows in the United States?

A. Well, there was John J. Fry & Co., Portland, Me., and my impression is that Ira Hunt made some harrows at that time. There were one or two more that I cannot remember. I now remember Wilms.

Q. What proportion of the harrows manufactured in the United States were made by the persons who did not become members of the National Harrow Company?

A. I should think ten or fifteen per cent. of them, and might not have been over five.

Q. Who was instrumental in forming the corporation known as the National Harrow Company, of New York?

A. The conspicuous instrument was Mr.——

289 Objected to by complainant, that the record of the incorporation and what was done being in writing, is the best evidence.

Overruled and exception.

A. The conspicuous instrument was Mr. Edwin H. Risley; Charles H. Childs, Utica; Leroy W. Stevens, Albany; Heber C. Reed, Kalamazoo; Frank J. Henry, Kalamazoo; W. S. Lawrence, Kalamazoo. Now these people were the moving people; there were others went in.

Q. When, for the first time, was the defendant asked to join the National Harrow Company, of N. Y. I mean after it was organized, as near as you can state it?

A. I should say it was in July, 1890.

Q. And in what manner were you asked to become a member of the National Harrow Company, of N. Y.

A. We were presented with an agreement which embodied the general idea of the company to be organized and asked to sign it.

Q. Who presented the paper to you?

A. My impression is that that particular paper was sent to us by mail and we were asked to sign it.

Q. Can you say by whom?

A. My impression would be that it came from Mr. Risley.

Q. Have you the paper now?

A. I have.

Witness presents paper and commissioner marks it Exhibit 100.

Objected to by complainant upon the ground that the paper presented has no signature, and is not proved to have been authorized by the National Harrow Company.

Overruled and exception.

Paper received and attached to this deposition.

Q. Mr. Bement, you never signed this preliminary agreement, did you?

A. No sir, I never did.

290 Q. Afterward, and some time early in the fall of 1890, were other papers presented to you by some one connected with the National Harrow Company, on the subject of your company going into the National Harrow Company? If so, who presented them?

A. They were and presented by Mr. Risley.

Q. Were those papers signed by your company?

A. Yes.

Q. Did you then become a director and the first vice-president of the National Harrow Company, of N. Y.?

A. I did.

Q. What other concerns signed the first set of papers?

A. D. C. & H. C. Reed & Co.; A. W. Stevens & Son; E. Bement & Sons; W. F. Lawrence, successor of Lawrence & Chapin. Geo. Sweet & Co.; Charles H. Childs & Co.; Chase, Taylor & Co.; Eureka Mower Co.; Childs & Jones; Du Wayne B. Smith & Co.; Herndeen Manufacturing Co.; McSherry Manufacturing Co.; L. C. Lull & Co. I do not distinctly remember some of them, except Hench & Dromgold.

Q. Did you have a correspondence with some of the officers of the National Harrow Company, in regard to this subject?

A. I did.

Q. Who was the secretary and treasurer of the National Harrow Company, of N. Y.

A. At that time it was Edward Norris, who is now dead.

Witness produces letter.

Q. Did you receive for your company a letter from Mr. Norris, the treasurer, about October, 1890, which you now produce?

A. I did.

Q. You know the signature of Mr. Norris?

A. I do.

291 Q. What do you say as to the name subscribed to that letter, whether or not it is his signature?

A. It is the signature of Edward Norris.

Defendant's counsel offers the letter in evidence, and it is marked Exhibit 101.

The plaintiff objects in due time to the receipt of the letter upon the ground that it is the declaration of the plaintiff assignor, and is not competent as affecting the plaintiff's alleged cause of action, and upon its face it shows that it was a transaction occurring before the execution of the contracts in suit.

Overruled and excepted.

A copy of this letter and of the others introduced are to be attached to the deposition but the defendant's counsel is to have the original letters before the referee at every hearing hereafter, subject to the inspection of plaintiff's counsel and of the referee. Plaintiff's counsel declines to accede to the above request.

The plaintiff's counsel neither accedes nor denies the request, as he says there is no reason for him to say anything about it.

Q. Did you receive this letter on behalf of your company about the date of it?

A. I did.

Defendant's counsel offers the letter in evidence. Plaintiff's counsel makes same objection as before. Being understood that a similar objection is *is* to be continued to all of the correspondence hereafter offered in evidence without making a specific objection to each letter.

Overruled, exception.

Letter received and marked Exhibit 102, and copy to be attached hereto.

Q. Was there an enclosure in that letter, and if so, what?

A. There was. It was this paper I now produce.

292 Q. What was the purpose of this paper. I mean by that what was to be done with it?

A. It was to be sent out to all the customers of E. Bement & Sons, who handled spring tooth harrows.

Q. Was this also to be sent out by all the manufacturers who had gone into the National Harrow Company, of N. Y. at that time in the same manner?

A. It was.

Q. I notice, Mr. Bement, the date of this letter which enclosed it, is Nov. 15th, 1890. The circular bears date Jan. 1st, 1891. Are you able to explain why it was that the circular was dated ahead, and if so, what?

A. It was dated Jan. 1st, so as to give us time to address the envelopes and have them ready to go out at one time, viz., Jan. 1st, 1891.

This circular now offered in evidence, received and marked Defendant's Exhibit 103.

Objection by plaintiff continued as before to this circular.

Overruled, exception.

Q. Did you receive that letter shown witness?

A. I did.

Letter offered in evidence, dated Nov. 26th, 1890, signed C. H. Childs. Marked Defendant's Exhibit 104, (three sheets.)

Plaintiff's counsel object, as before, and for the further reason that the letter is from Chas. H. Childs, and it is not established that he had authority to write the letter and it also appears that the letter was written by him individually.

Overruled, exception.

Q. What official position did Chas. H. Childs hold in the National Harrow Company, of N. Y.?

A. He was president.

Q. Did you write and send the National Harrow Com-
293 pany, of N. Y., a letter, of which the copy is now shown you, at about the date of the letter?

A. I did.

Letter offered in evidence and marked Defendant's Exhibit 105.

Plaintiff's counsel objects, for reasons before stated, and also that the letter purports to be a letter-press copy.

Defendant's counsel calls upon counsel for plaintiff to produce the original of the letter last offered.

Plaintiff's counsel fails to find the original.

Letter received, copy to be attached.

Plaintiff's counsel further objects that the letter offered is wholly immaterial.

Overruled, exception.

Q. Did you write and send a letter about Dec. 4th, and dated on that day, to Chas. H. Childs, president?

A. I did.

Letter offered in evidence and marked Defendant's Exhibit 106.

The plaintiff objects for the reasons before stated to previous letter.

Overruled, exception.

Letter received, copy to be attached.

Q. Did you receive an answer from Chas. H. Childs to the two last letters put in evidence, If so, will you produce it?

A. I did, and do produce it.

Letter offered in evidence and marked Defendant's Exhibit 107. Dated Dec. 8th, 1890.

Plaintiff's counsel makes same objection to this letter as before.
Overruled, exception.
Letter received, copy to be attached hereto.

294 Q. Did you receive from Mr. Norris, the treasurer of National Harrow Company, of New York, the letter now shown you?
A. I did.

Letter offered in evidence, and marked Defendant's Exhibit 108.
Plaintiff's counsel objects as before stated.
Overruled, exception.
Letter received and marked Defendant's Exhibit 108, copy to be attached.

Q. Did your company write and send Chas. H. Childs, pres't, a letter of which I now show you a copy?
A. We did.

Copy offered in evidence and marked Defendant's Exhibit 109.
Same objection continued as to this letter.
Overruled, exception.

Q. Did you receive it in reply to that the letter which I now show you?
A. We did.

Letter offered in evidence and marked Defendant's Exhibit 110.
Same objection continued to this letter.
Overruled, exception.
Letter received and copy to be attached hereto.

Q. Did you write and send to the National Harrow Company the letter, copy of which I now show you?
A. I did.

Letter offered in evidence, and marked Defendant's Exhibit 111.
Objected to upon the ground that the plaintiff or his predecessor received no such letter, and also on the grounds before stated.
Overruled, exception.
Letter received, copy to be attached hereto.

Q. Did you receive the letter which I now show you?
A. We received the letter.

295 Letter offered in evidence and marked Defendant's Exhibit 112.
Objection before mentioned continued to this letter.
Overruled, exception.
Letter received, copy to be attached hereto.

Q. Did you receive the letter which I now show you?
A. I did.

Letter offered in evidence and marked Defendant's Exhibit 113.
Letter received, copy to be attached.

Q. Did you write and mail to C. H. Childs, a letter copy of which I now show you, about the time of its date?

A. I did.

This letter offered in evidence, marked Defendant's Exhibit 114.
Objections to this on grounds stated to previous letters.
Overruled, exception.
Letter received, copy to be attached hereto.

Q. Did your company receive the letter which I now show you about the time of its date?
A. We did.

Letter offered in evidence and marked Defendant's Exhibit 115.
Recess for an hour.
Letter received, copy to be attached.

Q. Witness produces letter and is asked, did you receive this letter about the time of its date?
A. Yes.

Letter offered in evidence and marked Defendant's Exhibit 116.
Same objection as before.
Letter received, copy to be attached.

296 Q. Did your company write and mail a letter now shown you?
A. Yes.

Letter offered in evidence, marked Defendant's Exhibit 117.
Letter received and copy to be attached.

Q. Did you receive about its date, the letter which I now show you?
A. We did.

Letter offered in evidence, and marked Def't's Ex. 118.
Letter received and copy to be attached.

Q. Did you receive at about its date the letter which I now show you?
A. We did.

Letter offered in evidence and marked Def't's Ex. 119.
Letter received and copy to be attached.

Q. Did you write and mail a letter copy of which I now show you?
A. We did.

Letter offered in evidence and marked Def't's Ex. 120.
Letter received and copy to be attached.

Q. Did you receive a letter which I now show you?
A. Yes.

Letter offered in evidence and marked Def't's Ex. 121.
Letter received copy to be attached.

Q. Did you receive the letter which I now show you at about its date?
A. Yes.

Letter offered in evidence and marked Def's Ex. 122.
Letter received and copy to be attached hereto.

297 Q. Did you receive at about its date, the letter which I now show you?
A. We did.

Letter offered in evidence and marked Def't's Ex. 123.
Letter received and copy to be attached hereto.

Q. Did you receive the letter which I now show you at about its date?
A. Yes.

Letter offered in evidence and marked Def't's Ex. 124.
Letter received and copy to be attached.

Q. Did you write and mail the letter now shown you?
A. Yes.

Letter offered in evidence and marked Def't's Ex. 125.
Letter received, copy to be annexed.

Q. Did you write and mail the letter which I now show you?
A. Yes.

Letter offered in evidence and marked Def't's Ex. 126.
Letter received and copy to be attached hereto.

Q. Did you write and mail the letter which I now show you?
A. Yes.

Letter offered in evidence and marked Def't's Ex. 127.
Letter received, copy to be attached.

LUTHER M. JOY, witness called by the defendant and sworn.

Q. What is your age, and occupation, and how long have you been engaged in the business in which you are now?
298 A. I reside at Albion, Mich., am 43 years of age, dealer in agricultural implements, and have been for five years.
Q. During that time have you dealt in spring tooth harrows?
A. Yes, sir.
Q. Do you know what is considered by the trade a float spring tooth harrow?
A. Yes, sir, I do.
Q. State what it is.

Plaintiff's counsel objects, on the ground that the question is incompetent, and immaterial and not a proper question.
Overruled. Exception.

A. What I consider as a float harrow is one that depends upon its own weight and the condition of the soil for the depth of the teeth when in operation, and when being transported from the field is turned over on the back, or in other words not under the control of the operator when in operation.
Q. Do you know the harrow manufactured by E. Bement & Sons, known as the lever Ajax harrow?

A. Yes, sir.
Q. Is that a float spring tooth harrow?

Same objection to this last question.
Overruled. Exception.

A. I should not consider it a float spring tooth harrow.
Q. Would the lever harrow manufactured by E. Bement & Sons known as the Ajax lever harrow, in your opinion be considered in the trade, a float spring tooth harrow?

Plaintiff's counsel objects same as before.
Overruled. Exception.

A. No, sir.

299 Cross-examination by Mr. RISLEY:

Q. Please name the year that you first handled harrows having curved teeth.
A. 1890.
Q. Whose harrow did you then handle?
A. Taylor & Henry's.
Q. About how many did you buy that year?
A. About twenty-five.
Q. Do you know of any other dealer in your immediate locality that handled harrows employing curved teeth in that year?
A. I think the Gale Bros. did.
Q. Do you know whether they did or did not?
A. Yes, they did.
Q. The Gale Bros. are now known as the Gale Manufacturing Company?
A. No, sir.
Q. Where do the Gale Bros. live?
A. Albion.
Q. Did you have any conversation with them about spring tooth harrows in 1890?
A. No, sir, not that I remember.
Q. Whose harrow did you handle in 1891?
A. Taylor & Henry's.
Q. Whose harrow did you handle in 1892?
A. Taylor & Henry, and E. Bement & Sons.
Q. What was the name of E. Bement & Sons' harrow that you handled in 1892?
A. Steel King.
Q. Was that a harrow the teeth of which were adjusted by a lever?
A. No, sir.
Q. How many Steel Kings did you handle in 1892?
A. Two.
300 Q. Did you settle for the two and pay the defendant for them?
A. Yes, sir.
Q. At what price did you buy those harrows?

Defendant's counsel objects to the question as incompetent and immaterial, irrelevant, and reopening the case of the plaintiff.
Overruled. Exception.

A. I do not remember the price.
Q. Whose harrow did you handle in 1893?
A. Taylor & Henry, D. M. Osborne & Co., Lull & Skinner and——
Q. Were all these harrows lever or non-lever harrows?
A. Part of them lever and part without lever.
Q. Which part of them were lever harrows?
A. We had a few of Osborne's levers, and one of Lull & Skinner, the balance were without lever.
Q. In what way were the harrows having levers, entered in the bills of Osborne & Company, and Lull & Company?

Counsel for the defense objects as incompetent, irrelevant, immaterial and not the best evidence.
Sustained. Exception.

A. Simply as lever harrows.
Q. Whose make of harrows did you handle in 1894?
A. Lull & Skinner, Taylor & Henry, D. M. Osborne & Company, and North-Molilor Manufacturing Company.
Q. Was the Osborne harrows all lever harrows?
A. Yes.
Q. Was the 1894 harrows of Taylor & Henry make lever or non-lever harrows?
A. I think we had two lever harrows, and the balance without lever.
301 Q. What were the North-Molitor harrows, lever or non-lever harrows?
A. Lever harrows.
Q. Were Lull & Skinner harrows lever or non-lever harrows?
A. Both.
Q. What about Osborne's harrows?
A. Lever harrows.
Q. How many harrows in all did you handle that year?
A. About eighty.
Q. How many of those harrows were North-Molitor construction?
A. Sixty-four, I think.
Q. Who was the traveling man that sold them to you?
A. Mr. Moyers.
Q. Is he a traveling man in the employ of E. Bement & Sons?

Counsel for defense objects to the question as incompetent, immaterial and irrelevant.
Overruled. Exception.

A. No, sir; he is not.
Q. What price did you pay for those harrows?

Counsel for defense objects to the question as incompetent, irrelevant and immaterial.
Overruled. Exception.

A. Different prices according to size.
Q. Please give prices and sizes of these harrows?

Same objection as stated last above.

A. I could not give a correct answer without bills.
Q. Can you give us the list price without the bills?

Same objection as that stated last above.

A. $13.00 for 18-tooth, $15.00 for 20-tooth, and $16.50 for 24-tooth.

302 Q. Were there allowed to you a discount of more than $2.00 apiece on those harrows?

Objected, as incompetent, immaterial and irrelevant, and reopening the plaintiff's case.

A. I think not.
Q. Please state what discount, if you remember it, you were allowed on these harrows?

Objected to on same grounds as last above stated.

A. 10 %.
Q. Have you a part of these harrows on hand?

Same objection as last above stated.

A. Yes, sir.
Q. How many have you on hand now?

Same objection as last stated above.

A. As near as I can remember there is one 24-tooth, and twelve 18-tooth.
Q. Were these harrows that you bought during these years, bought for a retail or jobbing trade by you?

Same objection as last above stated.

A. For retail.
Q. What is the name of your house under which you do business?
A. Parsons & Joy.
Q. Has your house been sued by the National Harrow Company?
A. Yes, sir.
Q. Are you making defense in the action?

Objected to as incompetent, immaterial and irrelevant.
Overruled. Exception.

A. We have given North-Molitor power of attorney to defend the case.
Q. As you understand it they are making the defense in the action in their own interest?

Objected to same as last above stated.

A. Yes, sir.

303 Q. How many retail dealers of harrows are there in your town or village?

A. Two at the present time.

Q. Where did you ever see one of defendant's Ajax harrows?

A. I do not remember where.

Q. Please describe the construction of the defendant's Ajax harrow.

A. I could not describe it.

Q. Do you mean by that, that you never saw the harrow known as the defendant's Ajax lever harrow, and for that reason cannot describe it?

A. No, I do not mean that, I have seen the harrow somewhere but cannot just tell the difference between that and some other lever harrow.

Q. Can you tell where you saw the harrow?

A. No, I cannot tell where.

Q. Can you tell whether it was a diamond-shaped frame or some other style of frame?

A. No, sir; I don't think I could.

Q. Will you please mention some dealer in harrows employing curved teeth with whom you have conversed, if you have conversed with any one, upon the subject of what was a float harrow?

A. No one else only my partner.

Q. Then how are you able to swear here to what would be considered a float harrow in the trade?

A. Simply from the way I described the float harrow.

Q. Then when you speak of the trade and the use of the name "float harrow" you speak of it with reference to your definition of what you consider to be a float harrow?

A. Yes.

Q. In your view of what constitutes a float harrow, what would you call a harrow employing the ordinary spike teeth
304 where the harrow is drawn along on the ground? Would such a harrow be considered a float harrow?

A. No sir, I don't think it would be.

Q. Please designate what would have to be added to the harrow described in the last question to make it a float harrow?

A. You would have to add some device whereby it could be carried from the field without working to make it a float harrow. I don't see how it could be made a float harrow.

Q. Please state whether you would consider a harrow employing curved teeth which could be turned over on the bow of the tooth and drawn from the field a float or non-float harrow.

A. I would consider it a float harrow.

Q. Suppose you had a harrow employing curved teeth which had means provided for simultaneously adjusting the depth of the cut of the teeth in the soil, which could be turned over so that the bows of the teeth would run on the ground in transporting it from the field. Would you denominate such a harrow a float harrow?

A. No I would not consider it a float harrow.

Q. Do you know where and how the word "float" as applied to harrows originated?

A. No sir.

Q. When was the first time that you ever heard the word "float" applied to a harrow, and who mentioned that word?

A. I do not know, could not tell anything about it.

Q. Suppose a harrow employing curved teeth with the teeth arranged on the frame so that they could be independently adjusted, so that the points of the teeth could be taken out of the ground, and the harrow transported by running on the frame, with the teeth elevated so that they would not come in contact with
305 the ground, would you term such a harrow as that a float harrow?

A. It would depend altogether on how you adjusted the teeth.

Q. Then your distinction as to whether a harrow is a float harrow or a non-float harrow, depends upon how you adjust the teeth? Is that right?

A. Yes, that is one particular.

Q. Please state if there are any others.

A. The other particular would be in being able to turn the harrow over and having it ride on the bow of the teeth in transporting it from the field.

Q. Then in your view, the question whether a harrow is a float harrow or a non-float harrow depends upon the method of adjusting the teeth and whether the harrow can be transported bottom side upwards on the bow of the teeth?

A. Yes sir.

Q. You said a few minutes ago that a harrow where the teeth were adjustable, which could be turned over so that the bows of the teeth would run on the ground, you would not consider a float harrow. Do you wish to make any corrections in your answer in view of the answer to your last question?

I object to the question as assuming that the witness has answered in a manner which the record shows he has not answered.

Overruled. Exception.

A. I don't know that I do.

Q. Have you ever practically used a harrow employing curved teeth?

A. Yes sir.

Q. Please state the extent of your use personally.

A. I worked on a farm a good deal, but am not able to state just how much.

306 Q. Did you ever see a harrow employing curved teeth transported from field to field on the bow of the teeth bottom side upwards?

A. Yes sir.

Q. To accomplish the transporting of a harrow in that way, does it necessitate the disconnecting of the horses or the evener from the harrow and then attaching them to it afterwards?

A. Yes sir.

Q. Please state who used the harrow in that way that you know of, and when and where.

A. I saw a man by the name of Tompkins a year ago last fall about five miles southwest of Albion.

Q. What is the man's given name?

A. Enrich Tompkins.

Q. Now please describe just what he did.

A. He unhooked the evener, tipped the drag bottom side up, and then hooked the evener on, and drove off.

Q. How far did he drive the harrow in that shape?

A. I think he went about ten rods.

Q. Did he go that distance in the road, or on the plowed field or grass land?

A. He drove out of one plowed field into the lane, and from there into another plowed field.

Q. Who approached you to come here as a witness?

A. Mr. North.

Q. Is he in the employ of the defendant as you understand it?

A. I do not understand that he is.

Q. Did you and he talk over the subject of the distinction between a lever — a non-lever harrow?

A. I think not.

Q. Well, who have you talked it over with since you came to Lansing?

A. I have had some conversation with Mr. Bement.

Q. When was that?

A. This afternoon.

307 Q. What did he say to you on the subject of the distinction between a float and a non-float harrow?

A. He said they wished to show the difference between a float and a non-float harrow.

Q. Did he tell you what was the difference as he understood it?

A. Yes, sir.

Redirect:

Q. Did you and Mr. Bement talk about the term float spring tooth harrow, did you?

A. Yes.

Q. And Mr. Bement, did he ask you what you understood by that term and did you answer him and tell him what you understood by it?

A. Yes, sir.

Q. Well, is that all there is to it in regard to your talking with him about it?

A. Yes, sir.

Q. Did you ever hear the term "float harrow" applied to a spike tooth harrow?

A. No, sir, I never did.

LUTHER H. JOY.

Sworn to before me this 22d day of January, 1895.

W. A. MATTESON,
Commissioner.

FRED J. COOK, called and sworn as a witness for the defendant, testified as follows:

Q. Mr. Cook, where do you live, what is your age, occupation, and how long have you been engaged in the business which you are now in?

A. My name is Fred J. Cook, residence Fowlerville, Michigan, Livingston county, age 26, hardware business including agricultural implements, have been in the business for about 15 years, and for myself, about five years.

308 Q. What implements have you dealt in particularly?

A. Spring tooth harrows and other implements.

Q. For how long have you dealt in spring tooth harrows?

A. About twelve years.

Q. Do you know what is considered in the trade a float spring tooth harrow?

A. Yes, sir.

Q. State what it is?

A. A tool with a frame constructed of either wood or steel with a curved spring tooth, fastened independently, that is, adjusted each tooth separately, with the weight of the frame and the adjustment of the tooth to regulate the penetration of the teeth into the soil for the purpose of harrowing.

Q. Do you know the harrow manufactured by defendant, E. Bement & Sons, known as the Ajax lever harrow?

A. I do.

Q. Is that in your opinion, a float spring tooth harrow?

Objected to by complainant's counsel, on the ground that it is incompetent and inadmissible?

A. As the name of the article in the trade, I certainly would not.

Q. Would the Ajax lever harrow manufactured by defendant, in your opinion, be considered by the trade a float spring tooth harrow?

Objected to upon the same ground as previous question.

Overruled. Exception.

A. No, sir.

Cross-examination by Mr. RISLEY:

Q. Please describe the construction of the Ajax lever harrow?

309 A. The frame is made in two sections of angle bar steel, raised in front to clear obstructions. Bars running crosswise of each frame fastened to a hinge. The teeth attached to these crossbars, a lever attached to these bars on which the teeth are fastened by which means the harrow may be adjusted while in use or otherwise.

Q. Are you a local retail dealer of harrows?

A. I am. I have also sold harrows as a traveling salesman.

Q. Whom did you travel for?

A. E. Bement & Sons.
Q. Whose harrow did you handle in 1894?
A. D. M. Osborne, lever harrow. A lever harrow made by the Standard Harrow Company, and the Ajax harrow manufactured by E. Bement & Sons, lever harrow, the Steel King, and other wood frame floating harrows.
Q. Who was the wood frame harrow manufactured by?
A. Lull & Skinner of Kalamazoo.
Q. How many Steel King harrows did you purchase from Bement & Sons last year?
A. If my memory serves me right, not any.
Q. Were the harrows which you had carried over from a previous year?
A. Yes, sir.
Q. How many Ajax harrows did you purchase last year?

Objected to as incompetent and immaterial.

A. I am not sure that I purchased any last year.
Q. How many did you sell last year?
A. About six.
Q. Are you familiar with the license label of the National Harrow Company?
A. To a degree I am.
310 Q. Please designate what you understand their license label is?

Objected to by defendant's counsel as incompetent, immaterial, irrelevant.
Overruled. Exception.

A. Like the cut shown in Defendant's Exhibit 103 and is a brass tag.
Q. Was those brass tags attached to the defendant Ajax harrows which you purchased?

Objected to as incompetent, immaterial, irrelevant and reopening the plaintiff's case.
Overruled. Exception.

A. I am not positive, but think not.
Q. What is the name of your company?
A. Formerly F. J. Cook & Company, but at present, F. J. Cook.
Q. Please designate what harrows you handled in 1893?
A. The Ajax lever harrow, the Osborne lever harrow, the Steel King, North-Molitor, and Lull & Skinner floating spring tooth harrow.
Q. Was the National Harrow Company's license tag attached to the Steel King harrows that you bought of defendant in 1893?

Same objection as last stated above.
Overruled. Exception.

A. Am not positive but think it was.

Q. Was the plaintiff's license tag attached to the North-Molitor harrows which you purchased in 1893?

Same objection as last stated above.
Overruled. Exception.

A. I think so.

Q. What price did you pay for the Steel King harrows in 1893?

311 Objected to as incompetent, immaterial, irrelevant and re-opening plaintiff's case.
Overruled. Exception.

A. The regular list price with the regular discount, which I think was 40 % from list price, with an extra 10 % discount for cash.

—. In what years did you travel as a salesman for E. Bement & Sons?

A. In the years 1888 and 1889.

Q. Do you know in what year Bement & Sons began the manufacture and sale of the Ajax lever harrow?

A. To my knowledge in the spring of 1893.

Q. Please describe how the teeth in the Ajax lever harrow are fastened to the bar in the frame?

A. I think the bar is a round bar, the tooth is so constructed as to fit smoothly at an angle to the round bar with a bolt passing through the tooth and through the bar.

Q. Now let me call your attention to the tooth, whether the tooth is not held to the bar by means of a clip which fits over the lower flat surface of the tooth and against its edges, so that the bar passes through the clip and is held by a set-screw?

A. My recollection is that all the harrows we have had, the teeth are fastened to the bars with a bolt.

Q. Suppose means were provided in your Ajax lever harrows, for rigidly holding the hinges which carry the cross-bars in rigid position so they could not be adjusted, what would you then denominate the harrow in classifying it?

A. It would be rather hard to name.

Q. Would a harrow of such a construction be considered by you as a float or non-float harrow?

A. I would say it was not a float harrow, as I understand it.

312 Q. Suppose the cross-bars in the Ajax harrow, to which the teeth were rigidly bolted, was held in rigid position in the frame, would you call such a harrow a float harrow?

A. No.

Q. Is it your idea and has your evidence been based upon the proposition to constitute a float spring tooth harrow, you have got to have a harrow with the teeth so held that when the harrow is turned bottom side upwards, that it can be transported on the ground in that position on the bow of the teeth?

A. Yes, for the fact that all harrows that I have ever seen that have been termed float spring tooth harrows, have been made so that this might be done if desired.

Q. Then as you understand the word float, as applied to a harrow, it means a harrow that can be transported bottom side upward on the bow of the teeth?

A. Yes, sir.

Q. Please designate the person and the place where you ever saw a curved spring tooth harrow transported bottom side upwards on the bow of the teeth, giving the circumstance as to time and place.

A. I could not give an exact date. In the township of Handy, on different farms.

Q. Then the transportation which you refer to was from place to place in the same lot?

A. In and out of the field.

Q. Has suit been brought against you by the National Harrow Company?

A. No, sir.

Q. When were you first spoken to and by whom with reference to testifying in this suit?

A. E. Bement & Sons. In a letter, Saturday, January 19.

313 Q. Was that the first you knew there was such a suit pending?

A. Yes, sir.

Q. Have you that letter with you?

A. I have not.

Q. Is it in your possession at home?

A. No, sir, it is not as I destroyed it.

Q. Please state the contents of the letter as you now remember it.

A. We would like to have you come to Lansing between Monday and Wednesday, of next week, to testify in the suit against us by the National Harrow Company. Can you come?

Q. When did you come to Lansing?

A. Today.

Q. Who have you talked the matter over with upon the subject of classifying the construction of spring tooth harrows?

A. Mr. A. O. Bement.

Q. Does the depth with which the teeth in a spring tooth harrow go into the ground when the harrow is in use, have anything to do with classifying a harrow as a float or a non-float harrow?

A. In my opinion it does.

Q. Suppose the teeth in a harrow are placed so that they will work into the soil one-quarter of an inch where the bars are stationary. Would that be a float or a non-float harrow?

A. If set individually, a float.

Q. Suppose your Ajax harrows were provided with a stationary cross-bar, to which the teeth were bolted, so that their point would come in contact with the ground to the extent of a quarter of an inch, would that be a float or a non-float harrow?

A. No, it would not be a float harrow. It would be a non-float harrow.

314 Q. Now, suppose your Ajax harrows were provided with a stationary cross-bar, to which the teeth were bolted so that their points would come in contact with the ground to the extent of four inches, would such a harrow be a float or a non-float harrow?

A. Same answer as to previous question.

Q. Suppose your Ajax harrows were provided with a stationary cross-bar to which the teeth were attached so as to be independently adjusted, with their points arranged so as to engage the ground to the extent of a quarter of an inch. Would such a harrow be a float or a non-float harrow?

A. Non-float harrow.

Q. Suppose your Ajax harrows were provided with a stationary cross-bars to which the teeth were attached so as to be independently adjusted on the bar, and arranged to engage the ground when the harrow is in use, to the depth of four inches, would such a harrow be a float or a non-float harrow?

A. Answer same as last question.

Q. Suppose your Ajax harrows were provided with bars to which the teeth were bolted, arranged so that the bar could be adjusted without the aid of a lever, and held in its adjusted position so that the teeth would engage the ground a quarter of an inch, would you designate a harrow thus constructed a float or a non-float harrow?

A. I would say a float harrow.

Q. Now please designate if you can, your reasons for classifying a harrow as described in the last question as a float harrow?

A. For the fact of its being unmounted with the teeth so arranged that it could float on the points of the teeth while at work, without obstructions, that it might float on the bows of the teeth in taking to and from the field when desired.

315 Q. Would there be any trouble about moving a harrow on the bow of the teeth built upon the principle of your Ajax harrows where the cross-bars were held stationary in the frame without the lever?

A. No.

Q. Well then do you mean to say that a harrow constructed upon the principles set forth in the last question is a float or a non-float harrow?

A. A float harrow.

Q. Then assuming your last answer to be correct, what explanation have you to make, if any, of classifying your Ajax lever harrow with the bars held stationary and the teeth bolted to the bars, as a non-float harrow?

A. Not having the lever for adjustment. And also not to obstruct the harrow in floating on the bows of the teeth when desired.

Q. Then do you wish to be understood to assert that the classification of a float or a non-float harrow is determined solely by the question as to whether the harrow can be transported from field to field on the bow of the tooth, or whether it cannot?

A. Not exactly.

Q. Please designate and describe what would have to be done

to a non-float spring tooth harrow to make it a float spring tooth harrow?

A. That would depend upon the kind of a harrow that was termed a non-float harrow. If it was a riding harrow, would have to take the wheels off and do a lot of things.

Q. Is there any difference in the practical operation of a spring tooth harrow where the teeth are so placed on the frame that they will work in the ground four inches, as to whether those teeth were adjustable simultaneously, or individually or not at all?

A. I would think not, providing the teeth and frame were of the same style, weight and shape.

316 Q. Would you classify any spring tooth harrow that is constructed so that the frame could be carried from field to field on the bow of the teeth, so that the points of the teeth would not engage the ground, a float spring tooth harrow?

A. Yes, providing the teeth were termed spring teeth.

Q. Would it make any difference in classifying a harrow such as is described in the last question, whether the harrow was run bottom side upwards, or whether it was transported with the points of the teeth downward?

A. No, only that it might be transported in either way.

Redirect:

Q. Calling your attention to the last cross-question, I ask you whether you would consider a harrow a float spring tooth harrow, provided the bow of the teeth was thrown below the frame by a lever, and the points drawn up above the frame of the harrow and the harrow then rested upon the bow of the teeth, would you then call it a float spring tooth harrow?

A. I would not.

Q. Did you ever hear a peg tooth harrow called a float harrow?

A. Not by any one that I thought was able of classifying agricultural implements.

Q. What peg tooth harrow did you hear referred to as a float harrow?

A. I don't remember of any.

Q. When did you first see or hear of a lever harrow?

A. In the fall of 1892, or the spring of 1893. Somewhere about that time.

Q. What you mean to be understood as saying when you speak of that, which is known to the trade as a float spring tooth harrow, is one without a wheel or lever, or any device to carry the frame when the harrow is not in operation, is it not?

317 Objected to on the ground that it is grossly leading, witness should be required to state his own classifications instead of having them specified by the counsel.

Overruled. Exception.

A. It is.

Recross:

Q. In answer to my question, you stated that where a harrow could be transported from field to field, on the bow of the teeth, so that the points of the teeth would not engage the ground, you would denominate a float spring tooth harrow, and in answer to the first redirect question, you testified that you would not designate a harrow a float spring tooth harrow; providing the bows of the teeth were thrown below the frame by a lever. Now will you explain if you can, why you made those two answers, and why you classified the harrows differently?

A. Well, first, because it had no lever. That is, the first harrow in question. And the second harrow a non-float harrow, for the fact that its having a lever, in my opinion would be a lever spring tooth harrow.

Q. Then it is not a fact that the classification of a float harrow, means a harrow that can be transported from field to field on the bow of the tooth?

A. As I understand that, it is. Also must be able to run the harrow on the points of the teeth when desired.

Q. Is it not a fact that you can run a non-lever harrow or a lever harrow precisely the same on the points of the teeth?

A. You can.

Q. In point of fact have the points of the teeth anything to do whatever with classifying a harrow as a float or a non-float?

A. No more with one than the other.

Q. Does the lever attachment to a spring tooth harrow,
318 perform any other function than to afford means for simultaneously adjusting the teeth on each section of the frame?

A. No.

Q. About what distance do the teeth on a spring tooth harrow project below the frame as spring tooth harrows are ordinarily used?

A. That depends upon the soil of the ground, where they are used. For ordinary purposes I think about two inches.

Q. Suppose you applied a wheel six inches in diameter to the frame bars or to the frame of the harrow, so that when the harrow was turned bottom side upwards, the harrow could be transported from field to field on the bows of the teeth. What would you classify such a harrow, a float or a non-float harrow?

A. A float harrow, for the fact that the wheels of that size would be of no use; providing the wheels were large enough to carry the harrow, while at work, and otherwise I would classify such a harrow a mounted or wheel harrow.

Q. Then you do not mean to be understood to classify any harrow that had a wheel on it, a non-float harrow?

A. No.

Q. Your understanding then of a float harrow is that the harrow must be arranged in such a way that the same can be transported from field to field on the bow or bows of the teeth?

A. I do.

Q. The ordinary designation in your trade of a spring tooth harrow that has a lever attachment, is a lever spring tooth harrow, is it not?

A. Yes, sir.

FRED J. COOK.

Sworn to before me this 22nd day of January, 1895.

W. A. MATTESON,
Commissioner.

319 CORNELIUS A. GOWER produced and sworn as a witness for the defendant, testified as follows:

Q. What is your age, occupation, official position in connection with defendant, and how long have you held that position?

A. I am 49 years old, reside at Lansing, Michigan, and am interested in building and loan and manufacturing. I am vice president of E. Bement & Sons, and have been since the organization of the company, about eight years, which was the incorporation of the former copartnership of the same name.

Q. During that time has the defendant dealt in spring tooth harrows and also manufactured them?

A. It has.

Q. Do you know what is considered by the trade a float spring tooth harrow?

A. I think I do.

Q. You may describe it.

A. A float spring tooth harrow is one which has spring teeth of a circular shape attached to wood or metal frame in such a manner that each tooth is adjusted independently of others, and the tool as a whole rides upon the points of the teeth which may be so adjusted as to enter the ground at different depths. Another feature of the tool is the fact that whether in its normal position or bottom side up it always rides on the teeth and not on the frame.

Q. Would you call the harrow manufactured by the defendant, and known as the Ajax lever harrow, a float spring tooth harrow?

Objected to by plaintiff's counsel that the witness should state facts, second, incompetent and improper.

A. I would not.

320 Q. Would the lever harrow manufactured by defendant and known as the Ajax lever harrow, in your opinion be considered by the trade a float spring tooth harrow?

Same objection continued.

Overruled. Exception.

A. No.

Cross-examined by Mr. RISLEY:

Q. What was your business before you went into the building and loan business?

A. For eleven years I was superintendent of State Reform School

of Michigan, and for some years connected with E. Bement & Sons before their incorporation.

Q. Was your connection with E. Bement & Sons, prior to your connection with the State institution?

A. No, sir.

Q. When did your relations with E. Bement & Sons begin?

A. I think in 1882.

Q. What department of work did you have charge of during that employment?

A. I had no immediate supervisory care over any part of the work.

Q. Has your connection been simply of that of being financially interested in the business and an officer of the company?

A. Up to three years ago my relation was that of one who had a financial interest in the business, and one who was daily consulted with concerning the management of the business. During the past three years I have had an immediate supervisory care over a portion of the work, keeping up the more general and quite intimate acquaintance with the work as a whole.

Q. During the past year have you had special charge in the office or manufacture of the defendant of any specific portion of the business conducted by them?

321 A. Yes. I am at present in charge of the stove-mounting and stove-crating and the retail department. The retail department so called, which is a retail store owned by E. Bement & Sons in this city, where we sell goods of our own manufacture and a limited line of house-furnishing goods.

Q. Have you ever practically operated a spring tooth harrow in the field?

A. When superintendent of reform school, I had the care of a farm of 260 acres in connection with that institution, and among other tools, we had spring tooth harrows in use on the farm.

Q. I repeat the question.

A. No, sir. Not for any length of time.

Q. Whose harrow was employed on the farm of which you had charge? That is, whose make of harrow?

A. E. Bement & Sons.

Q. Do you find in the catalogue of E. Bement & Sons for 1894-'5 a cut illustrating the harrow which you used on the farm before referred to?

A. Yes. On page 85, and 86.

The catalogue referred to is Plaintiff's Exhibit 39, page 82.

Q. What would you designate a harrow having spring teeth, curved shape, rigidly attached to a wood or metal frame, so that when the harrow was used the points of the teeth would work into the ground. Would you designate such a harrow a float or a non-float harrow?

A. I would say that such a harrow had some of the elements which go to make up a float harrow, but from description you give it is uncertain whether it contains all the elements of a float harrow or not.

Q. What elements would you add to the harrow described in the last question to make it a float harrow?

322 A. I would say that if the harrow were so constructed that it would ride upon the bow of the teeth, if it were turned bottom side up, and so that individual teeth could be set at any angle independent of others, it would be a float spring tooth harrow.

Q. Then do you wish to be understood as saying, that if the harrow described in my previous question had the added element of the independent adjustment of the tooth, you would then designate it a float harrow?

A. No, I did not say that.

Q. Then please describe, if you can what elements you would add to a harrow having curved teeth, rigidly secured to the frame bars, to constitute it a float harrow?

A. The element of adjustability of individual teeth and the construction such that the harrow will ride on the bow of the teeth when turned bottom side up. In other words, such a construction that the harrow never rides on the frame, but always on the points of the teeth or on the bow of the teeth.

Q. Taking your last explanation, what would you term a harrow which was supported on the axletree with wheels where the frame never came in contact with soil. Would that be a float harrow or a non-float harrow?

A. A non-float harrow.

Q. Then do you wish to be understood as saying that the float harrow is one which must be so constructed as to ride on the bow of the teeth when the harrow is turned bottom side upward?

A. I mean to be understood to say that all float harrows have that element.

Q. Would you term a harrow like the one described in the last question, a float or a non-float harrow?

A. I don't understand that you described any harrow in your last question. You simply spoke of one element in a harrow.

Q. Would you classify any harrow which had curved

323 teeth attached to either metal or wood frame bars, where the bow of the tooth arched above and the points came below the frame bars, which could be turned upside down and transported on the bow of the teeth, a float harrow?

A. If it had the element of independent adjustability of individual teeth, and was so constructed that the depth which the teeth entered the soil, was regulated by the pitch of the teeth and not by any other appliance, I would call it a float harrow.

Q. Question repeated.

A. No. Not necessarily.

Q. Please give us your description of a lever float spring tooth harrow, and what you would understand by such a designation.

A. Don't know that I ever heard of such a name given to a harrow.

Q. Then you are not able to give what you would understand by such a designation?

A. I consider the title a contradiction of terms, therefore cannot answer it as asked.

Q. Are you familiar with the construction of what is termed the Ajax lever harrow manufactured by defendant?

A. I am.

Q. Suppose that harrow had the teeth secured to the frame bars in the manner in which they are now secured, and the bar was held stationary in the frame. Would you then term the harrow thus constructed, a float spring tooth harrow?

A. No.

Q. Suppose the Ajax harrow was provided with the curved teeth rigidly secured to bars which were provided with means for adjusting the depth of the cut of the teeth on each bar, independent
324 of the teeth on the other bars, would you term a harrow thus constructed, a float harrow?

A. No.

Q. Would there be any difficulty in turning a harrow upside down, if constructed as indicated in the last question, and transporting it on the bows of the teeth?

A. Yes.

Q. Please state what would prevent, if anything, the turning the harrow thus constructed upside down and transporting it on the bows of the teeth.

A. The lever.

Q. Was the lever the reason why you answered the question preceding the last one, as you did?

A. The reason why I answered the question preceding the last one as I did, was because you supposed that the Ajax harrow were constructed in some different manner than what it is. It would then not be the Ajax harrow.

Q. What would you designate a harrow having the same construction of frame bars as the Ajax harrow, where the curved teeth were bolted rigidly to the frame bars without any lever attachment. Would a harrow thus constructed, in your view, be termed a float harrow?

A. I can't answer that question.

Q. Would you say that a harrow constructed upon the same principle of the Ajax harrow without lever attachment which had the teeth bolted rigidly to the tooth bars, the tooth bars being provided with means for independently adjusting the bar and the teeth attached to it, independent from the other bars, a float harrow?

A. No.

Q. Are the teeth in the Ajax ever harrow independently adjustable on the tooth bars?

A. Yes.

Q. What would you designate the Ajax harrow built upon
325 the same principle that they are built upon, without the lever attachment. Would such a construction be a float harrow?

A. No.

Q. Please state why you would not classify a harrow thus con-

structed, a float harrow, pointing out the particular mechanical element which the harrow lacks to make it a float harrow.

A. It would not be a float harrow because it would have the teeth attached to a movable bar, which is not found in a float harrow.

Q. How would you classify a harrow where the outside bars were made in the form in which the Ajax harrow bars are made, with the tooth bars rigidly held to the outside bars with the curved teeth attached to the tooth bars so as to be independently adjustable on the bars. Would such a construction, in your mind, be considered a float harrow?

A. I can't answer that question unless you define more particularly in regard to one or two points.

Q. Please indicate what explanation you desire to enable you to answer this question?

A. I wish to know in your description whether you mean that the tooth bars are held to the frame so that they cannot be moved from their position as is the case with the Ajax, and also whether they are held so that they cannot be turned.

Counsel for plaintiff says that he distinctly stated in the question that the tooth bars were rigidly secured to the frame bars, and by that securing he meant so that the tooth bar had no movement whatever, except as it moves with the harrow itself, and with this explanation, the question is repeated and the witness is requested to answer.

A. Yes I think it would.

Q. How would you classify a harrow where the frame bars
326 were made in the form of the Ajax harrow, where the tooth bars were rigidly secured to the frame in a manner so that they have no movement except as they move with the harrow, and having curved teeth bolted to the tooth bars so that the teeth are not adjustable? Would such a harrow in your view be termed a float harrow?

A. No.

Q. Do you mean to be understood as including in other elements, of a curved spring tooth harrow, the element of the independent adjustability of the individual tooth as one element which constitutes a float harrow?

A. Yes.

Q. Then you would not classify any spring tooth harrow a float harrow, where the individual tooth was not capable of individual adjustment on the bars?

A. No.

Q. Then, if I understand your position correctly, two things must conspire in the same harrow to make it a float harrow: First, the adjustability of the individual tooth, and second, that the harrow is capable of being turned bottom side upwards and transported on the bows of the teeth. Is this correct.

A. Yes.

Q. Will you please classify and designate the proper name to be applied to a spring tooth harrow, which is capable of being turned

bottom side upwards, and transported on the bows of the teeth where the teeth are so attached to the frame or frame bars, as to have no means of adjusting their position?

A. Non-float.

Q. Did you ever hear in the trade the term non-float harrow as a trade term?

A. No.

327 Q. Do you know whether there has been for the last twelve or fourteen years, thousands of spring tooth harrows sold on the market, where the harrow could be turned upside down and transported on the bows of the teeth, where the teeth were rigidly secured to the frame, and non-adjustable?

A. I do not know that there have been.

Q. Did you ever hear in the trade of what was designated as the Garver harrow?

A. I have heard of it.

Q. Do you understand that that was the pioneer harrow in the line of spring tooth harrows?

A. My impression is that it was one of the very first.

Q. Do you know what designation in the trade this harrow received when it was put on the market?

A. I do not.

Redirect:

Q. You have been a director of defendant since its organization, haven't you?

A. I have.

Q. Do you attend the directors' meetings, and if so, how frequently?

A. I do attend the meetings, and have attended them all.

Q. Do you have a weekly meeting of directors or executive committee, and do you attend such meetings?

A. We do, and I attend the meetings regularly.

Q. In giving your testimony in regard to the classification of harrows, have you given it in reference to the classification as made by the trade?

A. As I understand it.

CORNELIUS A. GOWER.

Subscribed and sworn to before me January 25, 1895.

W. A. MATTESON,
Commissioner.

328 FRANK E. BROWN being called, as a witness for defendant and sworn, testified as follows:

Q. Where do you reside, what is your age, occupation and how long have you been engaged in the business which you are now in?

A. Grand Rapids, am forty years old, merchant and dealer in machinery and carriages and agricultural implements. Since the spring of 1878.

Q. Have you during that time dealt in spring tooth harrows?

A. Yes, sir; we have.

Q. Do you know what is considered by the trade a float spring tooth harrow?

A. Yes, sir.

Q. Please describe it.

A. It is a harrow made with either wood or metal frame with curved steel spring teeth fastened to the frame in such a way that the points of the teeth would be of a uniform distance from the bottom of the frame, and one in which by reversing or turning bottom side up, could be drawn on the bows or tops of the teeth.

Q. Do you know the harrow manufactured by the defendant, E. Bement & Sons, known as the Ajax lever harrow?

A. Yes, sir.

Q. What do you say in regard to that as to whether or not it is a float spring tooth harrow?

A. No, sir; I should not consider it so.

Q. Would it be in your opinion, considered by the trade a float spring tooth harrow?

Objected to upon the ground that the opinion of the witness is not competent. Question involved neither embraces science or skill which entitled the witness to give an opinion.

Overruled. Exception.

A. No, sir; it would not.

329 Q. Are any lever harrows known to the trade as float spring tooth harrows?

A. I have never known of them.

Cross-examined by Mr. RISLEY:

Q. How many years have you handled spring tooth harrows?

A. Since either 1880 or 1881.

Q. Have you ever handled the Ajax lever harrow?

A. Yes, sir.

Q. In what years did you handle the Ajax harrow manufactured by defendant?

A. In 1893 and 1894.

Q. How many did you purchase or handle in 1893?

A. I could not tell you just how many.

Q. About how many?

A. Probably not more than 25.

Q. How many did you handle in 1894?

A. Probably not over seventy-five.

Q. What did you pay for the Ajax lever harrow in 1894?

Objected to as incompetent, immaterial and irrelevant and reopening the plaintiff's case.

Overruled. Exception.

A. I could not tell you without having our invoices, as I don't remember the list on either size.

Q. You did receive from the defendant's invoices for the harrows purchased in 1894, did you not?

A. Yes, sir.

Q. Was the harrows purchased by written contract signed by you?

Objected to as incompetent, immaterial, irrelevant and reopening plaintiff's case.

Overruled. Exception.

330 A. They were bought by written contract, but the contract was not signed by me.

Q. Was it signed by defendants?

Same objection as last above stated.

Overruled. Exception.

A. No, sir.

Q. You say it was not?

A. Not by the defendants, but by their representative, as he understood it.

Q. Do you keep a retail store at Grand Rapids?

A. Yes, sir.

Q. Have you a partner in business?

A. Yes, sir.

Q. What is his name?

A. John Sehler.

Q. What is the firm name?

A. Brown & Sehler.

Q. Has suit been brought against you by the National Harrow Company, for selling or handling unlicensed harrows?

A. Not that I have ever known of.

Q. What other harrows did you handle in 1894, besides the Ajax lever harrow?

A. The Steel King, Clipper, and a few lever harrows made by J. I. Hoke & Company of South Bend, Ind.

Q. How many Clipper harrows did you handle in 1894?

Objected to same as last stated above.

A. I should presume one hundred and fifty Clipper harrows.

Q. And how many Steel Kings?

A. I should presume about the same number.

331 Q. Is the Clipper harrow manufactured and sold by defendant?

Objected to same as last stated above.

A. We buy them of the defendant.

Q. Did those harrows that you bought of defendant which they designate as Clipper harrows, have attached to them a brass label, or tag indicating that they were licensed by the National Harrow Company?

Objected to as last stated above.

A. They may have had, I never touch one of them, so am not certain whether they had or not.

Q. Is the Steel King manufactured and sold by the defendant?

Same objection as last stated above.

A. We buy them of them.

Q. Do you know whether those harrows had attached a brass tag indicating that they were licensed by the National Harrow Company?

Same objection as last stated above.
Overruled. Exception.

A. They may have had, I never handled the harrows and could not say.

Plaintiff's attorney shows witness the defendant's catalogue for the year 1894–'5, markedl Paintiff's Ex. 39, at page 87.

Q. Is the cut of the harrow which I exhibit to you, one that represent- what you term the Clipper harrow?

Same objection as last stated above.
Overruled. Exception.

A. It is.

Page 85 shown witness.

Q. Does the cut on this page represent the Steel King harrow?
A. It does.

Page 84 shown the witness.

332 Q. Does the cut on this page correctly represent the defendant's Ajax lever harrow?

Same objection as last stated above.
Overruled. Exception.

A. It does in a general way.

Q. Were the teeth on the Ajax lever harrows which you purchased in 1894, adjustable on the bar by means of a set-screw as illustrated in the cut on page 84?

Same objection as last stated above.
Overruled. Exception.

A. I could not state as I never set up or operated one of the harrows.

Q. How were these harrows in 1894 paid for, by check, note or cash?

Same objection.

A. We buy a great many goods besides harrows of Bement & Sons, and have a general running account with them. I know that part of the account has been settled by note and think that part of it has been settled by check.

Q. Give me the price which you were to pay for these harrows as near as you can remember.

Same objection.

A. There are certain lists and certain discounts. They were bought on these lists with the discounts taken off.

Q. Is the list to which you refer a printed list?

A. I think they have it printed in their catalogue.

Q. What discount was allowed you on these harrows, from list price?

Same objection.

Overruled. Exception.

A. There was $2 each and 10% for cash, or in some cases we have had them, as an accommodation to us, take our paper for at least part of it, we standing the discount so as to make it net them cash.

333 Q. Did Bement & Sons ship these harrows direct from their factory on your orders to your customers from time to time as you directed them?

Same objection.

Overruled. Exception.

A. They were mostly shipped to us at Grand Rapids. There may have been a few shipped to customers.

Q. When did you first hear the word "float" as applied to a spring tooth harrow?

A. As long ago as I remember anything about the harrow business. It is what was used to designate that style of a harrow from a wheel harrow.

Q. As you understand it, was the word "float" used in the trade to distinguish the harrow from a wheel harrow?

A. As we used to know harrows in years gone by, yes.

Q. Did you ever know the harrow designated in the trade as the Garver spring tooth harrow?

A. Yes, sir.

Q. Well the Garver harrow had the same general form of curved teeth that was found in the harrows that you bought of defendants last year, did they not?

A. Not entirely.

Q. In what particular did the teeth differ?

A. The Garver tooth had a straight or nearly turn at the end to fasten it rigidly to the frame, while the Clipper harrow teeth was curved at the end to fit to a curved seat on the frame, making the difference between a rigid and adjustable tooth.

Q. Was the Garver harrow known in the trade as a float spring tooth harrow?

A. Yes, sir.

Q. Did you know the wood-frame harrow known as the Reed harrow?

A. Yes, sir.

334 Q. Was the principal difference between the Garver and the Reed harrow, that of the adjustability of the teeth in the Reed harrow?

A. The difference in the two harrows was that the Reed had an adjustable tooth while the Garver did not.

Q. The Garver tooth was bolted rigidly to the frame bars were they not?

A. No sir.

Q. Please state how you understand how the Garver harrows had their teeth applied to the frame.

A. The Garver tooth had a flat surface which was fastened against the flat surface on the frame by having a clip across the tooth, the clip being bolted to the frame.

Q. The tooth in the Garver harrow fitted into a groove in the frame did it not?

A. No sir.

Q. How did the tooth fit the frame then?

A. It laid flat against the bottom of the frame and the wide clip bolted over it. The friction between the clip, tooth and the frame held the tooth in position.

Q. Who manufactured the Garver harrow in the manner which you have described and from whom were they purchased by you?

A. What we had were purchased from Ira Hunt of Kalamazoo?

Q. In what years did you handle those harrows?

A. I should think about 1887, 1888, and 1889, although I may be wrong.

Q. Were you present when Mr. Gower gave his evidence?

A. He was giving it when I came in. I heard what was given after I came in.

Q. Do you consider as one of the elements in a spring tooth harrow, as a necessary element to make it a float harrow, that
335 the teeth of the harrow must be provided with means for their independant adjustment?

A. Not necessarily.

Q. Do you consider that one of the necessary elements of a spring tooth harrow to make it a float harrow, as you understand it, that the harrow must be built in such a way that when the harrow is reversed, so that the bottom side of the harrow is up, the harrow can then be transported on the bow of the teeth?

A. Yes.

Q. Suppose a harrow is built so that the teeth could be independently adjusted in the position so that when the harrow is transported, it would ride on the bow of the teeth without reversing or turning it upside down. Would such a harrow be classified as a float harrow?

A. I cannot answer the question.

Q. In classifying and distinguishing spring tooth harrows from riding harrows or cultivators, does the question of whether the teeth are adjusted or not adjusted, have anything to do with the classification?

A. No sir.

Q. In classifying harrows where curved teeth are employed, so as to distinguish a wheel harrow or cultivator from any other spring tooth harrow, has the question of turning the harrow upside down

anything to do with classifying them for the purpose of distinguishing them in the trade?

A. Yes sir to a certain extent.

Q. Please state to what extent and in what manner.

A. A wheel harrow is transported without reversing but by raising the teeth out of the ground by levers attached to the frame. A float harrow is transported by turning it bottom side up when it uses the curved part of the teeth as runners.

Q. What designation is there in the trade to distinguish a wheel spring tooth harrow from any other kind of a spring tooth harrow?

336 A. There is what is known as the wheel spring tooth harrow and the lever spring tooth harrow and the float spring tooth harrow.

Q. Suppose a harrow is built with rows of teeth secured to frame bars, where the frame bars are provided with means for independently adjusting the teeth and the bars, without the use of a lever and its connection, in what manner would you designate such a harrow in the trade?

A. I should think that would be a float harrow.

Q. Suppose a harrow is built with rows of teeth secured to the frame bars, which are held stationary, provided with means for independently adjusting the teeth without lever, or its attachment, so that the harrow can be transported by riding on the curve of the teeth, right side up. What would you designate such a harrow?

A. I could not answer it; don't think it supposable.

Q. Would you designate a harrow thus constructed, a wheel harrow?

A. I should not designate such a harrow.

Q. Would you designate a harrow thus constructed as a lever spring tooth harrow?

A. I would not designate the harrow at all.

Q. How would such a harrow be classified; as a wheel harrow, a lever harrow, or a float harrow?

A. I cannot answer the question.

Q. Suppose a harrow was made with the frame bars in the same way as the Ajax harrow, with the tooth bars and the teeth mounted on the tooth bars, provided with means for moving the teeth and the independent tooth bars, without the lever and its attachments, so that the teeth and the bar could be put in position so that the harrow could be transported on the bow of the teeth right

337 side up. Would such a harrow be designated in the trade as a wheel harrow, a float harrow or a lever harrow?

A. There has never been such a harrow made, and it has not been classified and don't think it could be.

Q. Assuming that such a harrow could be built, how should it be classified in the trade?

A. I could not answer the question put in that way.

Q. Suppose you take the Ajax harrow as illustrated on page 84 of the catalogue, and take the levers off, as well as the connecting rod, and provide means for turning the tooth bar and the teeth on

it, so that the bow of the tooth would swing below the frame, and held in that position for transportation with the harrow right side up, into which class would such a harrow be classified in the trade? By the word "means," I mean to illustrate, that the tooth bar when changed into the position described may be bolted to the frame bars?

A. There would have to be a new class made.

Q. Suppose the Ajax harrow shown on page 84 of the catalogue, was constructed by entirely omitting the lever and its connecting rod and attachments, and the bar was held rigidly to the frame bars of the harrow, and the set-screw which holds the independent teeth was loose, and the fastening and the tooth on each bar was turned down so that the bow of the tooth would fall below the frame, and the set-screw was then tightened so that the harrow could be transported on the bows of the teeth, with the frame right side up, would you say that such a harrow was a float or a non-float harrow?

Objected to as being incompetent, immaterial, irrelevant, not proper cross-examination.

A. I should think it would be used that way as a float harrow.

Q. Now, Witness, is it not a fact that to constitute a float harrow as you understand it, that it is necessary to transport the harrow on the bow of the teeth, without reference to whether a harrow is right side or wrong side up?

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A. Not as I have always understood it.

Q. Won't you explain why you classified as a float harrow, the Ajax harrow where the teeth were independently adjustable on the bars so that the bow of the tooth would run on the ground in transporting it, the harrow being right side up?

A. I would not claim that the harrow was right side up when the teeth are bottom side up. The tooth in order to become a runner must be bottom side up.

Q. Then, do I understand you to say that you would classify as a float harrow, any harrow where the same could be transported on the bow of the teeth, by turning the teeth bottom side up?

A. No, sir.

Adjourned for one hour.

Redirect:

Q. When did you first see or hear of a lever harrow?

A. I think in the latter part of 1892, was the first I ever saw a lever harrow.

Q. In answer to next to the last question put by counsel on page 337, a harrow constructed as assumed in that question, was said by you to be a float spring tooth harrow. Would it be a practical implement?

A. I should think not.

Q. Why?

A. Too complicated.

Q. In giving your testimony, have you had reference throughout

to the classification of spring tooth harrows, as made by the trade generally?

A. Yes, sir.

Q. Are you a wholesale dealer as well as retail?

A. Yes, sir.

339 Recross:

Q. Please define in your own language, the styles of harrows which the trade designate as lever float spring tooth harrows?

A. Never heard of such a harrow.

Q. Please define the class of harrows which are known in the trade as float spring tooth harrows, pointing out what you consider as the distinctive designation of the word "float"?

A. What is known as a float harrow is a harrow with curved teeth fastened to the wood or metal frame, the teeth being either adjustable or non-adjustable.

Q. Please define your notion in the trade of what is meant by the word "float"?

A. To float, is to glide over the surface, is my understanding.

Redirect:

Q. In defining the word "float" in answer to the last question, you simply give a general definition, do you not?

A. Yes, sir.

FRANK E. BROWN.

Subscribed and sworn to before me, this the 23d day of January, 1895.

W. A. MATTESON,
Commissioner.

BARTON MILLER, being called as a witness for defendant, and sworn, testified as follows:

Q. Where do you reside, what is your age, and occupation, and how long have you been engaged in the business which you are now in?

A. I reside at Alma, Michigan, Gratiot county, age 45 years, occupation is traveling salesmen for Hench & Dromgold. Have been with them four years.

340 Q. What line of goods do you handle or deal in rather?

A. Spring tooth harrows, spring tooth cultivators, riding and walking and shovel cultivators, threshing machines, grain drills.

Q. Do you know what is considered by the trade a float spring tooth harrow?

A. Yes, sir; I think I do.

Q. Please describe it.

A. It is a harrow that will float over the ground either on the points of the teeth or on the back of the teeth. It would be a harrow with adjustable teeth, that may be adjusted to any desired depth.

Q. Do you know the harrow manufactured and sold by defendant, E. Bement & Sons, known as the Ajax lever harrow?

A. Yes, sir.

Q. What do you say in regard to that harrow, as to whether or not it is a float spring tooth harrow?

A. I should say that it was not a float spring tooth harrow.

Q. Is such a harrow considered by the trade a float spring tooth harrow?

A. It is not in the Michigan trade.

Q. Then, so far as you know, it has never been considered by the trade, a float spring tooth harrow?

A. No, sir.

Q. Are any lever harrows known to the trade as float spring tooth harrows?

Objected to as leading.

Overruled. Exception.

A. No.

Q. How are spring tooth harrows, which have levers, for adjusting the teeth, designated by the trade?

A. They are called lever harrows.

341 Q. When did you first see a lever harrow or know of their being manufactured?

A. I think I heard of them in '91. Never saw one until '92.

Cross-examined by Mr. RISLEY:

Q. Upon whose invitation or by whose request, did you come to Lansing, as a witness in this case?

A. E. Bement & Sons.

Q. Did you communicate with your house with reference to your coming here as a witness?

Objected to as incompetent, immaterial and irrelevant.

A. I did not, sir.

Q. Are you the State agent for the State of Michigan for the sale of Hench & Dromgold harrows?

A. Yes, sir.

Q. Are you now engaged in soliciting orders for their harrows?

A. While I am, I have a man that does the soliciting for me.

Q. Have you got a cut of the style of the harrow you are soliciting orders for?

A. Yes, sir; I think I have.

Q. Will you please produce them?

A. I will.

Witness produces catalogue of Hench & Dromgold.

Q. Are you taking orders, or having orders taken for you, of a harrow with curved teeth that are provided with wheels on the harrows, that are operated by a lever attachment?

A. I have not been.

Q. Are you getting ready to do so?
A. We expect to do so.
Q. Have you a cut of that harrow with you?
A. No, sir.
342 Q. Will you furnish a cut of it to be attached to your deposition?

Objected to as incompetent and immaterial, and having nothing to do with the issue in this case.

A. I don't know whether I could or not. The house has furnished me one, but I do not have it.
Q. Have you received instructions to sell lever harrows, provided with small wheels?
A. I don't know that I have received any instructions to s ll any.
Q. I show you the cuts in your catalogue shown on pages 18 and 19. What kind of a harrow would you call those?
A. We call it a lever harrow.
Q. The cut shown on both pages is the same harrow is it not, in different position?
A. Yes, sir.
Q. Do you understand that the harrows shown on those pages are licensed by the National Harrow Company, to your principal?

Objected to as incompetent, immaterial, irrelevant, fishy.

A. I do not know.
Q. Have you ever sold any of those harrows?
A. In 1893 we sold a few of them, I believe.
Q. According to your idea of a float spring tooth harrow, does that designation apply to a harrow where the teeth can be thrown forward and downward, so that the harrow can be transported on the bow of the teeth?
A. I think that is a presumpt-ous question.
Q. Assuming that it is a presumpt-ous question, what answer do you make to it?
A. I would not know until I saw a harrow that you could do that with.
343 Q. Assume that such a harrow could be built, what would its designation in the trade be?
A. I do not know,
Q. Does the distance which the teeth penetrate into the soil have anything to do with the classification of the harrow?
A. I don't think it does.
Q. Does the adjustment of the teeth have anything to do with determining the classification?
A. I don't just exactly understand what you mean there.
Q. Does the question whether the teeth can be worked into the soil a quarter of an inch or four inches, determine the classification of the harrow, as you understand it?
A. I don't think it does.
Q. Does the question as to whether the teeth can be simultane-

ously adjusted or independently adjusted, have anything to do with the classification of the harrow?

A. That is another thing I don't know anything about.

Q. You know in point of fact that there is a tool in the market known as a wheel harrow or cultivator, do you not?

A. Yes, sir.

Q. Do you know the fact that the word "float" is used to distinguish the ordinary spring tooth harrow from a wheel harrow?

A. Yes.

Q. What is your understanding of the word "float" as applied to a harrow mean?

A. My understanding of it is that a harrow that will float over the ground either on the point of the teeth, or can be turned over and float on the back of the teeth, or drawn, would be properly a float harrow.

Q. In which position would the harrow have to be to be
344 properly designated a float harrow, on the point of the teeth or on the bow of the teeth?

A. I do not know how it would make any difference in regard to the position.

Q. Would it be a float harrow on whichever side it was run?

A. I should think if it was a float harrow, it would be a float harrow whichever way it was run.

Q. Then, what you understand and mean to say is, that a harrow to be a float harrow must be so constructed that the point of the teeth will run in the ground and the teeth arranged so that the harrow can be transported on the bow of the teeth. Is this right?

A. I should think it would be a float harrow.

Q. Would the question whether the harrow could be transported on the bow of the teeth, either by turning the harrow bottom side up, or right side up, in your mind, have anything to do with classifying the harrow as a float harrow?

A. I don't think it would.

Q. Would the question whether the frame ran on the ground or was carried in any manner above the ground have anything to do with classifying the harrow a float harrow?

A. I don't know.

Q. Please define in your own language, the distinctive elements which must be in a spring tooth harrow to make it a float harrow.

A. The elements which I consider necessary to make the harrow a float harrow are that a harrow that can be drawn on the ground either on the points of the teeth or on the backs of the teeth.

Q. Did you ever see any kind of a harrow on earth that could not be drawn with the points of the teeth in the soil? Is not this the very purpose of a harrow of any kind?

345 A. I don't know that I ever did. I think so.

Q. Is it not a fact that any harrow, the frame of which ran on the ground, would properly be termed a float harrow?

A. Any harrow, the frame of which run on the ground, would be called a float harrow.

Q. In point of fact, such a harrow would float on the ground when drawn?

A. I don't know whether I can answer that or not.

Q. Please describe in your own language what construction would be meant and answered by the designation "lever float harrow."

A. I don't understand what is meant by a lever float harrow.

Q. Assume that your principals were licensed to build the lever harrows shown in your catalogue pages 18 and 19, under the designation of the harrow as a lever float spring tooth harrow. Would you say that that designation was a proper designation of the harrows shown on those pages?

Objected to as incompetent, immaterial, irrelevant, improper.

A. I don't know.

Q. Looking at the cut of the harrow shown on page 19, is that harrow constructed so that the frame bars will run on the ground?

A. If the teeth go deep enough in the ground, it will.

Q. Taking the harrow in position shown in the cut, would the teeth have to go in the ground at all for the frame to run on the ground?

A. In the position that the harrow is in now, neither the teeth nor the frame would run on the ground.

Q. The plaintiff offers in evidence pages 18 and 19 of catalogue referred to by witness.

Received and marked Exhibit 125 of January 23d.

346 Q. In the position shown on page 19, is that a float or a non-float harrow?

A. I should call it a non-float harrow.

Catalogue Exhibit 125, objected to as incompetent, immaterial, and irrelevant.

Overruled. Exception.

Q. You answered the question "In what position would the harrow have to be to be properly designated a float harrow, on the point of the teeth or the bow of the teeth?" To which you answered "I do not know how it would make any difference in regard to the position." Now, assuming this answer to have been correctly made, how do you reconcile it with the statement that the harrow shown on page 19 of catalogue is not a float harrow? And in your answer please point out and state the point of difference if there are any.

A. We have a lever here to throw the point of the teeth out of the ground, and lets the harrow run on the shoes on the bottom of the frame. It neither runs on the front of the tooth or the back of the tooth.

Q. Suppose a spring tooth harrow was made with the teeth arranged so that they projected below the bottom of the frame bars, so that when the harrow was put to work in the field, the teeth would enter the soil a sufficient depth to let the frame run on the ground. Would you designate a harrow of such construction a float harrow?

A. I should call it a float harrow.

Redirect:

Q. If a lever were put upon the harrow described in the last question put to you by plaintiff's counsel, would you then call it a float harrow?

A. No, sir.

Q. Counsel for plaintiff put to you this question: "Then, what you understand and mean to say is, that a harrow to be a float harrow, must be so constructed that the point of the teeth will run in the ground and the teeth arranged so that a harrow can be transported on the bow of the teeth. Is that right?" To which you answered, "I should think it would be a float harrow." In making that answer did you exclude in your mind every other element except those assumed in the question?

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A. Yes, sir.

Q. Then if a lever were placed upon a harrow as described in the question which has been quoted to you, would you then say the harrow was a float spring tooth harrow?

A. No, sir.

Q. Mr. Miller, where were spring tooth harrows first made?

A. Kalamazoo, Michigan.

Recross:

Q. Suppose the defendant's Ajax harrow was provided with stationary tooth bars, and the lever and its attachments entirely removed, and the teeth were made adjustable on the bars so that they could be adjusted into position where the harrow could be transported on the bow of the teeth, extending below the bottom of the frame bars, would a harrow of that construction be a float or a non-float harrow?

A. I should say it would be a float harrow.

Q. Assume that the defendant's Ajax harrow was constructed with the lever and its attachments removed, and the tooth bars so arranged that they could be turned and held so that the harrow could be transported on the bow of the teeth, would a harrow of that construction be a float or a non-float harrow?

A. I should consider it a float harrow.

Q. Then, do you mean to be understood as saying that you would consider any harrow a float harrow where the frame was carried off from the ground, either on the bow of the teeth or on shoes?

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A. I don't know how to answer that question exactly.

BARTON MILLER.

Subscribed and sworn to before me, this the 23d day of January, 1895.

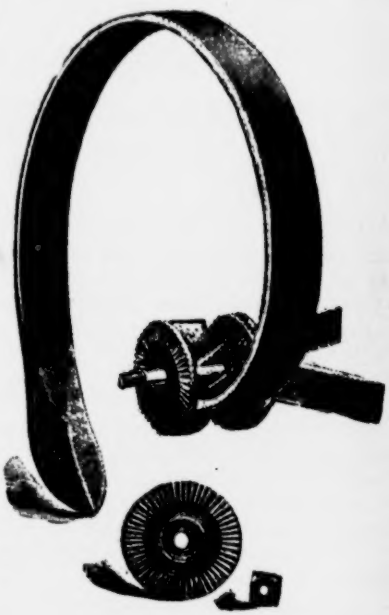
W. A. MATTESON,
Commissioner.

349 Ex. 125, of Jan. 23, '95. W. A. M.

THE BEST TOOTH-HOLDER EVER INVENTED.

The tooth is held in position by a ratchet, with which it can be adjusted so as to wear from 15 to 18 inches off the point of the tooth, which is four or five times as much wear or service as can be obtained from any other spring tooth harrow in existence.

Special features.—The adjustment of the teeth in all other harrows heretofore manufactured has been by the horizontal movement and the curved seat for adjusting the teeth deep or shallow. The greatest variation attained by this is not more than three inches. Hence, when about three inches *is* worn off the point of the teeth, they are worn out, and the teeth have to be replaced by new ones, which cost almost as much as a new harrow. In our new ratchet tooth-holder, as shown in cut, the tooth is securely clamped between two malleable ratchet clips, which engage with the ratchet frame clip, and is held firm and secure by one bolt to each tooth, on which it rotates as on a pivot. By this arrangement the teeth can be set at any depth or angle required, and if the points of the teeth are worn or cut off as much as fifteen inches they can be set to run as deep as when new. All that is required to adjust the tooth is to slacken one nut and raise the tooth up or down as necessary and then tighten up the nut which holds it firmly in the ratchet teeth, allowing it no possible chance to get loose and slip as is so often the case where they are held by a smooth clip.



The frame is constructed of only six different pieces of steel running diagonally from one tooth to the other, extending the full length of the harrow, thus forming four brace bars to each tooth, which gives it the greatest possible strength for the weight. It is so hinged that either side can be raised straight up or at right angles for passing stumps or trees. No rivets or bolt heads are under the frame to wear off and get loose, as on other harrows.

It is licensed under the National Harrow Company, and we fully guarantee all dealers and farmers who handle or use our harrow

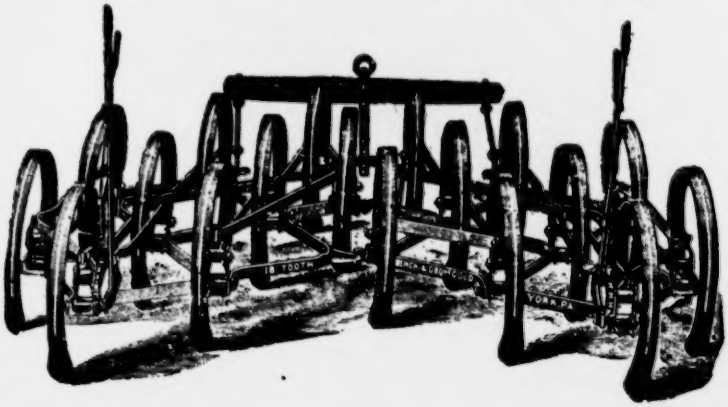
against royalties or infringement. Any farmer can readily see at a glance the great benefit and durability of our tooth-holder; and the construction of our harrow, and after a thorough trial could not be induced to purchase any other kind.

16-tooth harrow.....	$18.00	20-tooth harrow.....	$22.00
18-tooth harrow.....	20.00	22-tooth harrow.....	24.00

Lever spring tooth harrows as shown on pages 18 and 19, $1 extra.

350 HENCH & DROMGOLD'S ALL-STEEL FRAME SPRING TOOTH LEVER HARROW.

A wonderful improvement in lever spring tooth harrows.



In making our new lever harrow we use the same zigzag steel frame used in our other style float harrow so that the frame could be used for either harrow if desired. Teeth are bolted between malleable fastenings which hinge upon the bolt extending through the frame-piece and are connected with an adjusting bar and is so arranged that when the harrow is in operation and teeth in the ground it will not pull the lever forward if disengaged in the rack casting; or in other words it is just as easy to adjust the teeth deep or shallow while the harrow is in operation as when standing still. We have two different notches in which the teeth are fastened and when four or five inches are worn off they can be set in another fastening, and by this adjustment in connection with the operation of the adjusting lever, can be worn almost entirely out the same as in our ratchet tooth harrow.

Each tooth has a curved shoe under the frame, making a good sliding support. We guarantee our lever harrow to be one of the most complete and the best lever harrow ever offered to the trade.

Correspondence and orders solicited.

HENCH & DROMGOLD, *York, Pa.*

351 EXHIBIT 125, JAN. 23, 1893. W. A. M.

HENCH & DROMGOLD LEVER HARROW.

The above cut represents our lever spring tooth harrow with teeth raised out of the ground for floating or cleaning it of trash, and when in this position it drags on the small shoes, one of which is connected underneath the frame at each tooth.

The points of the teeth come entirely above the frame and the frame will prevent the trash from raising up with the teeth, thus making it a harrow that will clean or free itself from weeds, trash, etc., very easily.

The frame is bolted together solid and firm and makes just as rigid a frame as our float harrow, and in this particular is much stronger and more staunch than the frames of other lever harrows.

Our lever harrow is acknowledged to be superior to any other in the market and we solicit trade from the public.

HENCH & DROMGOLD, *York, Pa.*

352 HENCH & DROMGOLD'S NEW IMPROVED SPIKE TOOTH HARROW.

This is one of the best and strongest smoothing harrows ever offered to the public. The frame is made of zigzag bars of steel, same size as is used in our spring tooth float harrows. The teeth are of steel and are fastened with malleable ratchet plates and can be adjusted to any angle or pitch desired.

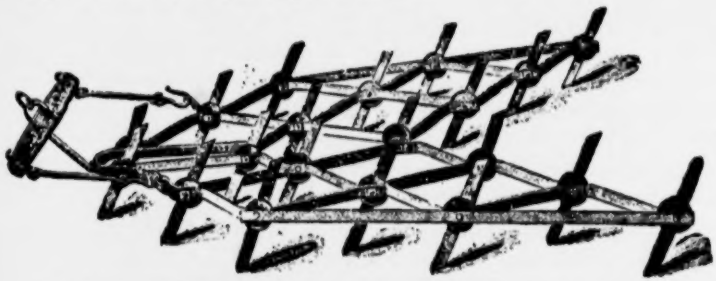


Fig. 1 represents the spike tooth harrow with teeth standing forward.

There are also three different holes through the teeth for setting them deep or shallow or adjusting them deeper as they wear off.

Both sides of the harrow are the same and it can be turned upside down in a moment and thus can be used with the teeth slanting forward, giving it suction for very hard ground, making it a splendid cultivator, and by simply unhooking the double tree and turning it on the other side, the teeth slant backward and it is a splendid smoothing harrow and will not catch on stones or rocks and will clean or free itself very easily of trash.

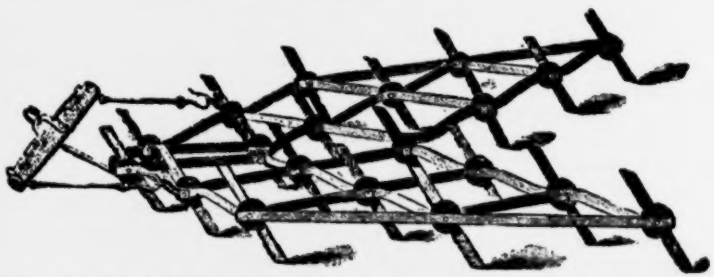


Fig. 2 represents the spike tooth harrow turned on the other side with teeth slanting backward.

Price of 18-tooth harrow complete with doubletree.....							$12 00
"	20	"	"	"	"	"	..... 13 00
"	22	"	"	"	"	"	..... 14 00
"	24	"	"	"	"	"	..... 15 00

353 The examination of Mr. ARTHUR O. BEMENT resumed:

Q. Mr Bement, did you attend a meeting of the directors of the National Harrow Company of New York, about October '90 at Buffalo, I think, when the question of whether or not the licenses upon which this action is founded, covered wheel harrows?

A. Yes, sir, I was.

Q. Do you remember a discussion among the directors upon that subject?

A. I do.

Q. What was that discussion?

A. The question was raised as to whether a float spring tooth harrow meant a wheel spring tooth harrow, and it was unanimously conceded that a wheel spring tooth harrow was not a float spring tooth harrow.

The plaintiff objects to that part of the answer which states that it was unanimously conceded.

Q. What was the result of the action, or what action was taken in regard to that matter at that time?

A. There was no official action taken in regard to it, as the parties present said that it did not cover wheel spring tooth harrows.

Q. Had the term float spring tooth harrow been used in the papers presented to you prior to that time?

A. It is my impression that it had.

Q. At that time was anything said as to what was covered by the term float spring tooth harrow?

A. It was said that the term float spring tooth harrow covered harrows such as we were all making which were arranged so as to adjust each tooth separately, such as we were all making.

Q. At that time were some of them making wheel harrows?

A. They were.

Q. Do you remember who? If so state them.

354 A. E. Bement & Sons, D. C. & H. C. Reed & Co. and others.

Q. Was there any other discussion at that time in regard to the term, float spring tooth harrow, than that you have given us?

A. There was not.

Q. At that time had you ever seen or heard of a lever spring tooth harrow?

A. I had not except what were mounted on wheels.

Q. Do you remember the fact that the first set of papers which had been signed by you and the rest of the parties had been declared by Judge Smith of New York illegal?

A. I do.

Q. When did you meet with the directors of the National Harrow Co., of N. Y., after you learned that fact?

A. I remember where we met but not the exact date. At about Feb. 25th, at the Broezell house, 1891.

Q. You attended that meeting, did you not?

A. I did.

Q. At that time was the subject talked over in the board of di-

rectors of the National Harrow Co., of New York as to this decision of Judge Smith?

A. It was.

Q. And what was finally done about it, that is the settlement of the suit brought by the Clipper Chilled Plow Co.?

A. It was amicably adjusted.

Q. Now, when next was there a meeting of the board of directors or the executive committee of the National Harrow Co., of N. Y., and where?

A. There was a meeting held at Utica, N. Y. May 27, 1891.

Q. Were you present at that meeting?

A. I was.

355 Q. What, if anything, was decided by the National Harrow Co., should be done with the papers which had been signed by the manufacturers and which Judge Smith had decided to be illegal?

A. It was decided to destroy them.

Q. Do you remember what you did with your copy of them?

A. My impression is we turned it over to the secretary of the company, Edward Norris, for the purpose of destroying same.

Q. Have you ever seen them since, or any copy of them that you know to be a copy?

A. I have not.

Q. You had acted, that is, your company had acted under those papers, up to the 27th day of May, 1891, had you not, and so had the others, who had signed them with the exception of the Clipper Chilled Plow Co.?

A. We had and they had so far as I know.

Q. Had some controversy arisen between you and the National Harrow Co., of New York, in regard to your contract *which* Chas. La Dow of Albany, and if so what?

A. There was a controversy and we fixed it up at that meeting.

Q. At that time you had not signed the new set of papers known as Ex. 1, 2, 3, 4 and 5?

—. We had not.

Q. When did your company, and where sign Ex. 1, 2, 3, 4 and 5?

A. My recollection is that most of these papers were signed at Utica at the time of the arbitration. I think all of them, either the evening of the 16th or the morning of the 17th of June, 1891.

Q. Mr. Bement, at the time the exhibits were signed, which I have called your attention to, who was present at Baggs' hotel at that meeting?

356 A. Heber C. Reed of D. C. & H. C. Reed & Company, Leroy Stevens of A. W. Stevens & Son, W. S. Lawrence of Lawrence & Chapin, W. A. Dromgold of Hench & Dromgold, George Sweet of George Sweet & Company, Mr. Van Horne of the Farmers' Friend Manufacturing Company, Chas. H. Childs of Chas. H. Childs & Company, James Manning of Syracuse Chilled Plow Company, Frank J. Henry of Chase, Taylor & Company, Edward Norris of the Eureka Mower Company, O. J. Childs of Childs & Jones, De Wayne B. Smith of De Wayne B. Smith & Company, Edward W. Herendeen of the

Herenden Manufacturing Company, L. C. Lull of L. C. Lull & Company, C. A. Gower and A. O. Bement of E. Bement & Sons.

Q. What was there done?

A. Arguments were made and submitted to the arbitrators named in the papers, with reference to the allotment of stock in the National Harrow Company.

Q. Was a decision afterwards rendered by the arbitrators?

A. There was.

Q. Was the stock of the National Harrow Company issued to the parties entitled to it, or to some one representing the parties?

A. It was.

Q. Can you state what corporations there represented and entitled to stock had stock issued in some individual's name for the benefit of the corporation?

A. I can. Stock was issued to A. O. Bement for E. Bement & Sons, to Edward Norris, for the Eureka Mower Company, and others I am not posted on.

Q. At that time what manufacturers of spring tooth harrows were there in the United States, not in the National Harrow Company?

A. Pitts Agricultural Works of Buffalo, Syracuse Chilled
357 Plow Company of Syracuse, Clipper Chilled Plow Company of Elmira, N. Y., and the Whipple Harrow Company of St. Johns, Michigan.

Q. Which, if any, of these parties soon thereafter joined the National Harrow Company, and received capital stock in payment for patents and rights transferred to the National Harrow Company?

A. Pitts agricultural works, Syracuse Chilled Plow Company.

Q. After those two companies had been taken in what proportion of spring tooth harrows made in the United States were made by those belonging to the National Harrow Company?

A. Probably from 80 to 90 per cent.

Q. Did the National Harrow Company of New York, or has the plaintiff ever manufactured or dealt in spring tooth harrows?

A. It has not. The old company in an arrangement to get Ira Hunt, I think, out of the harrow business, bought a lot of material that he had on hand that was disposed of to members of the National Harrow Company.

Q. Mr. Bement, what is the expense of manufacturing spring tooth harrows now as compared with 1891?

Objected to by plaintiff's counsel, on the ground that it is immaterial and incompetent. Also the witness should state the cost of material and manufacture, and is not authorized to institute comparisons.

Overruled. Exception.

A. The material entering into the construction of a spring tooth harrow is now worth about 60 % of the cost of the same material in 1891. The price of labor is about 80 % of the price of labor in 1891. The labor entering into the construction of a harrow is about 40 %

of the cost, and the material is about 60 % of the cost. On
358 this basis the cost of spring tooth harrows in 1894 in the fall, would be about 68 % of the cost of the same harrow in 1891.

Q. Mr. Bement, do you remember the annual meeting in September, 1892, in New York, when the question of lever harrows came up before the National Harrow Company directors, and when a committee consisting of yourself, Mr. Jewell and some others were appointed in relation to lever harrows?

A. I do.

Q. Did you make a report to the directors of what the committee concluded in regard to lever harrows and give the reasons for your conclusions?

A. We did.

Q. State what you reported.

A. We reported confidently to the meeting that as Mr. Blaker had already been licensed to manufacture lever spring tooth harrows, that if a lever spring tooth harrow was construed as a variation of a float spring tooth harrow, and as Blaker had an exclusive license to build a lever spring tooth harrow, that no other member of the association could build a lever spring tooth harrow, and that it was our opinion that lever spring tooth harrows did not come under the agreement as a float spring tooth harrow, and that we had no patents which would prevent any one from making lever spring tooth harrows, and that the sensible politic thing to do was to license all the members to make lever spring tooth harrows of their own device provided that it did not exactly duplicate Blaker's harrow or the harrow of some other member of the combination.

Q. What did you report as to whether or not there should be a new license to cover lever harrows?

A. We reported that a new license should be gotten up to
359 cover lever spring tooth harrows in as strong and substantial a manner as possible.

Q. What was done with your report?

A. It was adopted.

Q. At that time did you make a report in writing or oral?

A. We made the report orally.

Q. Was Mr. Blaker at that meeting?

A. He was.

Q. Did Mr. Blaker hear the report?

A. He did not.

Q. At that time were any of the licensees except Mr. Blaker manufacturing a lever harrow?

A. Not that they were making any great noise about, none were put on the market that I know of except the Blaker.

Q. At that time a future day was fixed when the lever harrows were to be ready and exhibited to the executive committee of the plaintiff for them to pass upon, and decide whether they should be licensed or not. Is not that correct?

A. It is.

Q. The place fixed upon was Auburn, and the time about November 3, 1892, was it not?

A. I think it was.

Q. Did you attend the meeting of the executive committee on that day fixed?

Q. I did.

Q. Had all of the licensees at that time sent in their lever harrow to be passed upon?

A. My recollection is they all had been, either a harrow or a section.

Adjourned for hour and a half.

360 Q. Do you remember whether or not there was a vote taken to license the harrows furnished?

A. I think there was.

Q. The licenses were not made out then?

A. They were not.

Q. They were not for a long time afterward, were they?

A. Some of them were not, at least.

Q. Did you receive a license made out for a lever harrow sent to you by the secretary of the plaintiff?

A. We did.

Q. Did you ever sign it?

A. We did not.

Q. Have you the lever license contract that was sent to you, and if not, what became of it?

A. We had it but I have been unable to find it and have no doubt it was thrown into the waste-paper basket.

Q. What was the reason you did not sign it, Mr. Bement, for your company?

Objected to by plaintiff's counsel on the grounds that reasons are immaterial unless they are made known to the plaintiff.

Overruled. Exception.

A. After carefully looking over the ground, we believed that there were no patents that could control the lever spring tooth harrow business, and that any one who was disposed to do so, could make lever spring tooth harrows, without asking anybody's permission. That lever spring tooth harrows involved in their construction an entirely different set of patents, and that under such circumstances it would be foolish for us to take out a license to build lever spring tooth harrows.

I move to strike out the answer or so much thereof, as relates to the belief of the witness as influencing his decision.

361 Q. Mr. Bement, what is known to the trade as a float spring tooth harrow?

A. Such harrows as were made in 1890 whose teeth were adjustable separately, and which relied upon the weight of the frame and the condition of the soil wholly to determine the depth of the cut, and which were capable of being thrown over on the bows of the

teeth and drawn from field to field when not at work. They were a specific harrow the name for which designated a harrow which was then in common use and known to the trade generally as a float spring tooth harrow.

Q. Is the Ajax lever harrow manufactured by defendant, a float spring tooth harrow?

A. It is not.

Q. Is any lever harrow, spring tooth harrow I mean, known to the trade as a float spring tooth harrow?

A. It is not.

Q. Was a peg tooth harrow ever known to the trade as a float harrow?

A. It never was.

Q. When did you first know of a lever harrow being made and put on the market with spring teeth?

A. In 1892.

Q. And what harrow was that?

A. It was the Blaker harrow and I think the Osborne harrow.

Cross-examined by Mr. RISLEY:

Q. Do you remember at the first meeting of the directors of the National Harrow Co., of N. Y. held in Buffalo, that arrangements were partially made to purchase the business and the interest in patents which G. B. Olin & Co., of New York then owned?

A. I think I do.

Q. Did you understand that the arrangement for the purchase was afterwards completed?

A. I did.

362 Q. What price in money did you understand was paid G. B. Olin & Co., for their business and interest in patents?

Objected to as incompetent, immaterial, irrelevant.

Overruled. Exception.

A. I do not recollect what the price was.

Q. You remember it was in the neighborhood of fifteen thousand dollars?

Same objection.

Overruled. Exception.

A. I am not able to say.

Q. Did you have any correspondence with the company on that subject?

A. I presume I may, although I don't know.

Q. Give as your recollection as to the sum which was paid for G. B. Olin's business.

A. I have no recollection of the amount.

Q. Did you advance to the company to make that purchase, eighteen hundred dollars on the company's notes, to assist in raising a fund to pay G. B. Olin's company?

Same objection.

A. We assisted in the manner specified, but the amount I could not tell.

Q. Note dated Oct. 10th, 1890, and letter dated Jan. 25th, 1892, handed the witness and he is requested to state whether that is the note and a letter written by your house to the plaintiff with reference to the note given by the National Harrow Co., to your people for $1,800.

Same objection.
Overruled. Exception.

A. It is.

363 Q. Does the note bear the endorsement of your house?

Same objection.
Overruled. Exception.

A. It does.

Q. I offer the note and letter in evidence.

Objected to same as above.
Overruled. Exception.

Letter and note received and marked Plaintiff's Ex. 126 and No. 127. Copy to be attached.

Q. Do you remember that at that meeting in Buffalo at the time the note was given, that licensed contracts and other papers which had been before that date signed, were on that occasion delivered to Wm. G. Howard, of Kalamazoo, to be held by him in escrow, until such time as the purchase of G. B. Olin & Co.'s business was consummated?

A. I do not remember the transaction you mention.

Q. Will you produce a letter dated "Oct. 24th, 1890, written by the National Harrow Co. to E. Bement & Sons?"

The plaintiff offers in evidence a copy of the letter same received and marked Plaintiff's Ex. 128.

Q. Does that letter refresh your recollection with reference to the amount paid, and holding the papers by Mr. Howard in escrow until that was accomplished?

A. I should have to rely entirely upon the statement of the letter, as I do not now recall the circumstances.

Q. Well do you recall the circumstance that there was a controversy at Buffalo, growing out of G. B. Olin & Company, refusing to go into the company?

A. I do.

Q. And you know the fact that G. B. Olin & Company did retire from the harrow business, and have not resumed it?

A. I think I do.

364 Q. Do you remember the circumstance of the purchase by the National Harrow Company of a California patent, or rather a patent owned by California parties, which the company paid quite a large sum of money for?

A. I remember the circumstance and the purchase of a patent

owned by a party in Portland, Oregon. I think there was three thousand dollars paid for it, or said to have been paid for it.

Q. Had you signed the papers before going to Buffalo in October, 1890?

A. I am not positive, but think we did.

Q. Were those papers signed at Lansing on the 12th day of September, 1890, and delivered to Mr. Risley under a special contract signed at the same time?

A. It is my recollection that they were.

Q. Do you remember at the October meeting of '90, whether one of the then directors of the National Harrow Company resigned, and you were elected into the board to take his place?

A. I think there was.

Q. From that time until September 12, 1893, did you participate in the meeting of the directors, and in the conduct of the company's business?

Objected to as incompetent, immaterial and irrelevant.
Overruled. Exception.

A. I did participate in various meetings of the directors.

Q. After the October meeting of 1890, did your company ship samples of the harrows which they were licensed to build to the National Harrow Company?

A. We did.

Q. Please give the date if you please?

A. The third day of November, 1890.

Q. Please read from the bill, the designation of the harrows as appears in that bill?

365 A. One 16-tooth Clipper harrow. One 16-tooth Steel King harrow.

Q. Will you please state, or rather describe the Clipper harrow?

A. The Clipper harrow was a wood frame with 16 spring teeth attached to the frame by means of a clip and adjustable on the seat, and built in two sections, hinged together.

Q. Were the teeth on the Clipper harrow placed in a groove, having a corrugated surface on the under side of the frame?

A. I don't think it was, though I am not positive.

Q. Did you assign to the National Harrow Company a patent which covered features of the Clipper harrow?

Objected to as incompetent, immaterial and irrelevant.

A. I think not as it was built then.

Q. Did you assign a patent to the National Harrow Company, which covered the Clipper harrow or features of it, as you built it at one time?

A. We did.

Q. Was the Clipper harrow which was shipped to the company on the third of November, constructed in the same way that the Clipper harrow has been constructed since that time?

A. I believe it has.

Q. You have referred in your previous testimony to patent controversies existing between your company and what you have been pleased to term the Big Six. Will you please state how long that controversy had been going on in the court prior to the 12th of September, 1890?

A. Probably eight or ten months.

Q. When did you begin the manufacture and sale of what has been since termed the Steel King harrow?

A. In the spring of 1889.

366 Q. How many suits as you now remember, were brought against purchasers and dealers in your harrows prior to the 12th of September 1890.

A. I don't recollect. Anywhere from six to a dozen.

Q. Who was the plaintiff in those suits?

A. D. C. & H. C. Reed & Co.

Q. Did you appear in the interests of your customers and interpose defenses in those suits?

A. We did.

Q. Was an application for an injunction made and heard before Judge Brown, of Detroit, in the year 1889, or thereabouts?

A. I do not remember.

Q. Do you remember of employing Parker & Burton of Detroit, to defend those suits?

A. We did.

Q. And do you remember that an injunction was granted in some one of those suits?

A. I do not.

Q. Do you remember that an injunction was granted in the Smith & Brabb case?

A. I don't remember that such an injunction was granted.

Q. Did Reed & Company claim in those suits, and also claim in circulars issued and sent out to the trade that you were an infringer of their patents?

Objected to as incompetent, immaterial, irrelevant, and not the best evidence.

Overruled. Exception.

A. They did.

Q. Did you publish and circulate to the trade a denial of their claim, and notify the trade that if they were interfered with you would defend them, and would also bring suit against Reed & Company on the patent? Please state in your own language what there was of that matter.

Same objection.

367 Q. We took Judge Brown's decision in the Smith & Brabb case and published that part of his decision which covered the premises which he set up, and which to a casual observer badly demoralized the Reed patent, and sent it out with our own peculiar style of architecture, not caring to publish the conclusions which the judge drew from the premises, leaving that to the Big Six to do,

as the decision was against us, but which we knew the premises set up by the judge, did not warrant. We also had acquired possession of the Paddock patent which we claimed by virtue of the ruling of the Patent Office, antedated the Reed patent, that we should sue two customers of the Big Six on the Paddock patent for every one of our customers that they sued on the Reed patent.

Q. Did you bring some suits on the Paddock patent against customers of either one of the Big Six as you term them?

A. We did not on the basis of the promises we had made, we did not have to. We did, however, bring suit against G. B. Olin & Company one of the Big Six, on the Paddock patent.

Q. Did you join in the expenses in the controversy between Reed & Company, and Erbe of Detroit, growing out of an alleged infringement of the Reed patent?

A. My recollection is that the Eureka Mower Company paid its own expenses, except in such cases as where the hunting up of testimony was a mutual advantage.

Q. And in those cases you contributed to some extent to the expenses, did you?

A. My impression is that we secured and paid for certain of the evidence and the Eureka Mower Company did the same. We paid our attorneys and expenses and they paid their attorneys and expenses.

368 Q. Was there an injunction as you understand it, granted by the court in that case?

A. I think there was.

Q. And was the evidence used, you participated in paying for, to get that injunction vacated and a rehearing of the case ordered, in that case and in your case also?

A. The evidence was used in both of those cases.

Q. Was a rehearing granted in both the cases in which injunctions had been granted?

A. To the best of my recollection there was a rehearing ordered in the Smith & Brabb case, and the temporary injunction was dissolved in the Erbe case.

Q. Was the condition which you have described, the situation when you went into the harrow company in September, 1890?

A. So far as that describes it, it was.

Q. After that time nothing was ever done in any of the then pending suits. Is this correct?

A. Not that I know of.

Q. Did you understand at the time you went into the harrow Co., that suits had been brought by different members of what you term the Big Six, on a variety of harrow patents which were pending against every manufacturer of harrows that was outside of the Big Six, so far as you know?

A. I was not aware of that fact.

Q. Well you knew the fact that a number of suits were brought against the dealers in the Eureka harrow, did you not?

A. I did not know about it.

Q. The Big Six, as you term them, claimed to own patent, did

they not, that entitled them as they claimed, to the whole field of spring tooth harrow construction?

A. I do not now remember of anything they omitted to claim.

369 Q. Do you know in a general way that a large amount of money had been spent during the period of a number of years prior to the organization of the National Harrow Co., in alleged patent infringement cases relating to spring tooth harrows?

A. I had no personal knowledge of any account, with reference to the matters mentioned. I understood that G. B. Olin & Co., had assessed users of spring tooth harrows about ten dollars apiece before the expiration of the "patent on the Garver tooth."

(Examination of this witness suspended.)
Adjourned until nine o'clock Jan. 24th.

EFFINGER E. WHIPPLE, being duly called as a witness for defendant, and sworn, testified as follows:

Q. What is your residence, age, occupation and how long have you been engaged in the business in which you are now in?

A. St. Johns, Michigan; 49 years old; manufacturing agricultural implements, been in the business since 1886, and in the harrow business since 1878.

Q. During that time have you dealt in spring tooth harrows?

A. I have.

Q. Do you know what is considered by the trade a float spring tooth harrow?

A. I do.

Q. Please describe it.

A. What we call a float harrow in the trade is a harrow that in order to transport it has got to be turned over on its back or loaded on a stone-boat or wagon. I mean a spring tooth harrow. The bars to which the teeth are attached are rigid, but the teeth can be adjusted by adjusting one at a time, but in order to transport it, it would not be practicable to adjust each tooth, in fact it would take longer to adjust the teeth so that it could be transported in
370 that way, than it would take to load it onto a wagon or stone-boat. It can be constructed in various ways, cross-pieces running in diamond shape or straight across, horseshoe frames or various other ways.

Q. Do you know the harrow manufactured by defendant, and known as the lever Ajax harrow?

A. I do.

Q. Is that harrow a float spring tooth harrow?

A. It is not.

Q. Is that harrow considered in the trade a float spring tooth harrow?

A. Objected to on the ground that it is incompetent, immaterial, witness not competent to speak.

A. It is not.

Q. Is the Ajax lever harrow manufactured by defendant in your opinion, a float spring tooth harrow?

Objected to on the ground that the evidence is incompetent, and not the proper subject of inquiry.

Overruled. Exception.

A. It is not.

Q. Are any lever harrows known to the trade as float spring tooth harrows?

Objected to on the ground that a general inquiry is not competent.

Overruled. Exception.

A. They are not, at least I have not seen any.

Cross-examined by Mr. RISLEY:

Q. In your view does the question as to whether the teeth are made adjustable on the frame or whether they are bolted rigidly affect the question as to whether such a harrow is a float or a non-float harrow?

A. Don't affect it at all.

Q. Then why did you include in your description of a float harrow that it was to be a harrow in which the teeth are independently adjustable?

371 A. I said it could be so made, but did not say it was made so.

Q. In point of fact the question of whether the teeth are or are not adjustable cuts no figure then?

A. I don't think it does.

Q. Does it make any difference in your mind as to whether a curved spring tooth harrow is provided with tooth bars on which the teeth are mounted provided with means for adjusting and holding the bars and teeth independent of a lever and attachment, affect the question of whether the harrow is a float or a non-float harrow?

A. A float harrow.

Q. Does it in your mind, make any difference about transporting a spring tooth harrow on a stone-boat, whether it is a lever or non-lever harrow?

A. I don't think it makes any difference.

Q. Then why did you include in your description of a float harrow that it was one that could be transported on a stone-boat?

A. I said that in order to transport it you either had to turn it over or load it on a stone-boat or a wagon.

Q. Question repeated.

A. I have answered it fair and square.

Q. In your mind does the question whether a harrow has to be transported on a stone-boat, or can be transported on a stone-boat have anything to do with the designation of the term float or non-float harrow?

A. A harrow that in order to transport it has got to be loaded on a stone-boat or wagon or turned over, is what I term a float harrow.

Q. Suppose you took a lever harrow and put it on a stone-boat, would that make it a float harrow?

A. No sir.

Q. Then won't you tell what a stone-boat has to do with a float harrow?

372 A. A stone-boat is used on the farm for the purpose of transporting from field to field or from a barn to a field, implements and other things about a farm that cannot be transported without loading them on to something.

Q. Does loading a harrow on to a stone-boat make it a float harrow?

A. No, sir.

Q. Does a stone-boat float along on the ground when it is drawn?

A. Yes, sir.

Q. Does the fact that the stone-boat floats on the ground when the harrow is on it, determine the classification of the harrow?

A. I don't think it cuts any figure with the harrow at all. I wish to say in addition to the answer given to the last question except one, that in calling a stone-boat a float I wish to compare it to a sled as it is on the same principle.

Q. In your mind does the harrow on a wagon determine whether it is a float or a non-float harrow from the mere fact that it is on the wagon?

A. I don't think that the wagon has anything to do with it, except as a vehicle for transporting the harrow or other implements.

Q. Does the question as to whether the tooth bar in the harrow is held rigid in the frame, enter into the question as to whether the harrow is a float or a non-float harrow?

A. It does.

Q. Would you say that all float harrows, as you understand that term, must have rigid bars in the frame?

A. Yes. A tooth bar must be adjustable so you can adjust all the teeth by adjusting the bar, but when the bar is tightened up it becomes rigid, and when rigid it is a float.

373 Q. Do you mean that where the tooth bars in the harrow frame are made adjustable but are provided with means for holding the tooth bars rigid that such a harrow is a float harrow?

A. No. I don't mean that.

Q. Will you please explain what you mean by saying that where the tooth bar is adjustable and held rigid when adjusted, that such a harrow would be a float harrow?

A. I mean that while the tooth bars are adjusted each independently by being fastened at some one or two points by a bolt passing through or a clamp around the bar; that cannot all be adjusted at one time by either a lever or its equivalent, that such a harrow is a float harrow.

Q. Suppose means were provided for simultaneously adjusting and holding two bars, when adjusted by a bolt, would such a harrow be a float or a non-float harrow?

A. I should consider that a float harrow.

Q. Suppose means were provided without the use of a lever and its connecting mechanism, by means of which all of the tooth bars in each section of the harrow could be simultaneously adjusted and held when adjusted, rigidly, would such a construction of a harrow be a float or non-float harrow?

A. The question does not explain the point so that I can give a satisfactory answer.

Question repeated and the commissioner is requested to instruct the witness to answer the question as asked.

A. If a harrow without a lever or its equivalent, the tooth bars could all be adjusted simultaneously, and in order to do that would have to stop and make the change, which would be equivalent to adjusting the teeth one at a time, only a much shorter way, it would be a float harrow.

374 Q. Does the question of the time it takes to adjust the teeth determine whether the harrow is a float or a non-float harrow?

A. It is not the question of the time taken for it, it is the differences, one in adjusting the teeth separately, or by bars as before stated, without a lever, and the other with a lever.

Q. Does the element of the manner in which the harrow is used and transported determine whether it is a float or a non-float harrow?

A. To a certain extent it does.

Q. Suppose means were provided for tipping the bow of the tooth forward and the points upward, so that when the harrow was transported it would ride on the bow of the teeth instead of the points of the teeth, would such a harrow be a float or a non-float harrow?

A. Having never seen a harrow of the kind without a lever, it would be pretty hard to tell. But without a lever it would be a float harrow, or without a lever equivalent.

Q. Then, in view of your last answer, does the question whether the harrow rides on the bow of the teeth determine whether it is a float or a non-float harrow?

A. No.

Q. Will you state in concise language what you understand by the word float?

A. Anything floating along.

Q. To your mind does the question of how a thing floats determine whether it is floating or not?

Objected to as incompetent, immaterial, irrelevant, not cross-examination.

A. I don't just understand the point.

Q. Does the word "float" as applied to harrows indicate, to your mind, a harrow that moves along on the surface of the ground?

A. They all move along on the surface of the ground.

375 Some of them have supports and some don't. Common spike tooth harrows and all harrows of that class float along on the ground.

Q. Do you know, and have you known for a good many years, of a tool designated as a wheel harrow?

A. Yes, sir; a number of them.

Q. Are all wheel harrows operated by a lever or its equivalent in lowering the harrow teeth into contact with the soil, or lifting them out of the soil when the harrow is operating, at the will of the operator?

A. All wheel harrows that I know anything about are operated by a lever or its equivalent.

Q. Are all of the frames of these harrows to which the teeth are attached, suspended to an axletree so that the frame to which the teeth are attached never comes in contact with the ground when the harrow is used or transported?

A. The frames do not come in contact with the ground as the wheels act as supports, same as shoes.

Q. Does the question of operating a wheel harrow by a lever determine whether it is a wheel or a non-wheel harrow?

A. Have never seen a wheel harrow without a lever or its equivalent, and would be unable to state something I do not know.

Q. Does the lever make it a wheel harrow?

A. I should say not.

Q. Does the lever have anything to do with making it a wheel harrow?

A. I should say not.

Q. Suppose a harrow was constructed employing curved spring teeth, provided with means for raising the frame and the teeth out of contact with the soil by means other than the use of a lever would such a construction be classed as a float or a non-float harrow?

A. I cannot answer that question. Because the harrow sets up in the air.

376 Q. Suppose a harrow was constructed with curved teeth either stationary or independently adjustable, was provided with shoes or runners which could be attached by bolts so as to elevate the harrow and the teeth above the ground, so that when it was transported it would ride on the shoes, without the teeth coming in contact with the ground, and when the harrow was transported to the field where it was desired to use it, the nut were released and the shoes removed. Would such a harrow be a float or a non-float harrow?

A. With the shoes removed it would be a float harrow.

Q. With the shoes on what kind of a harrow would it be?

A. It would be a sled and you could not make a harrow of it until you took the shoes off so it would go in the ground.

Q. Then would you term a harrow where some portion of the frame ran on the ground while the harrow was being transported a sled harrow?

A. They are so termed, sometimes a sled harrow, sometimes a wheel harrow I have heard them called both.

Q. Well, as you understand it, does a sled float along the surface of the earth and ground?

Objected to as incompetent, immaterial and irrelevant.
Overruled. Exception.

A. I should say a sled floats along the same as a wagon, and shoes are at all times considered as supports the same as wheels especially on agricultural implements.

Q. Does it make any difference whether the frame forms a shoe or must the shoe be an independent attachable or detachable portion?

A. That depends on how the frame is made. The frame
377 could be made in the shape of a shoe. If the frame was made as it was in the old-style harrows and covered the whole ground it would make some difference.

Q. Do you wish to be understood as saying that the shoe or runner formed in the way to make it a shoe and a wheel as applied to harrows would constitute such a structure a wheel harrow as understood in the trade?

A. I wish to be understood as this: That they are of course called by their proper names, one a sled shoe and the other a wheel harrow. Yet the action of the shoe has always been considered as supports and operate the same.

Q. Then you would consider a stone-boat equivalent to a wagon, would you?

A. It takes the place of a wagon in certain places.

Q. Please state Mr. Whipple, the elements which must be found in what you denominate a float harrow?

A. A float harrow is a harrow that in order to transport it, have to adjust each tooth separately or by adjusting the bars separately, or simultaneously without a lever or its equivalent. Curved spring teeth, and generally made in two sections, and a frame may be constructed in butterfly shape, or various other shapes, generally with three rows of teeth.

Q. Has the rows of teeth anything whatever to do with whether a harrow is a float or a non-float harrow.

A. No sir.

Q. Why did you include it then in the elements designated?

A. I stated that generally it had three rows of teeth and because the majority of harrows have been built that way, float harrows.

Q. Must a float harrow have first a frame?

A. Certainly.

378 Q. Must it also have curved teeth arching above and the points falling below the frame?

A. No.

Q. Must it have the teeth independently adjustable on the frame?

A. No.

Q. Must it have the teeth fastened rigidly to the frame?

A. Yes.

Q. Must the harrow when in use have some part of the frame come in contact with the soil?

A. I should say yes, to be a float harrow.

Q. Have you brought in different circuit courts of the United

States, a number of suits against the licensees of the National Harrow Co., upon the allegation that they were interested in a trust and a monopoly, in which you claimed large damages, amounting to a great many thousand dollars?

Objected to as incompetent, immaterial and irrelevant.
Overruled. Exception.

—. I don't know, but we brought suits.

Q. Did you bring suits in which you alleged and claimed that the National Harrow Co., was an illegal trust and combination, and that the parties who had bought harrows licensed by the plaintiff, were liable in large damages for having bought the harrows?

Objected to as incompetent, immaterial, irrelevant, and not the best evidence.
Overruled. Exception.

Q. We did, the Whipple Harrow Co.

Q. How many suits did you bring of that kind in the State of N. Y.?

Objected to same as above.
Overruled. Exception.

A. Three.

379 Q. How many suits did you bring in the State of Pennsylvania?

Same objection.

A. One.

Q. How many suits did you bring in the State of Michigan?

Same objection.
Overruled, exception.

A. We only brought one suit in Michigan.

Q. How much damage did you claim in the suit in Michigan?

Same objection.
Sustained. Exception.

A. I think it was fifty thousand. Am not positive about that.

Q. How much damage did you claim in each of the suits in New York?

A. That I am unable to tell.

Q. Don't you recollect that you claimed in each of those suits fifty thousand dollars?

A. I don't remember.

Q. What has become of the cases in New York State that your company brought?

Same objection.
Overruled. Exception.

A. I understood that the court held that on the grounds well taken we would have to furnish bond and give him sixty days to amend in.

Q Did you give the bond and amend?

Same objection.
Overruled. Exception.

A We did not.
Q Did you finally pay the cost in those cases?

Same objection.
Overruled. Exception.

A. We did.

380 Q. When you brought these various suits did you go out and advertise in a large number of newspapers and get them to print long articles with large, big headlines, informing the public of the great damage which you were claiming against what you claimed to be a great monopoly?

Objected to same as above.
Sustained. Exception.

A. We did not. The newspapers came to us for news.
Q. And you gave the information to the newspapers did you?
A. Yes, that we were going to bring suits. The information in regard to the trust, and the workings of it, etc., they got from a published statement made by the Inter-Ocean of Chicago. The Inter-Ocean sent a man to Kalamazoo and looked up the matter. We had nothing to do with it.
—. Was the bringing of the suits by you published with large-lettered headlines in Chicago, Buffalo, Detroit, Pittsburg, and in other places?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.
Sustained. Exception.

A. It was.
Q. Did you bring those suits in good faith believing you could recover damages?

Same objection.
Overruled. Exception.

A. We did. And think so yet.
Q. Why haven't you pressed the cases to trial instead of withdrawing and paying the costs in the three cases in New York?
A. I don't really want to tell the reason why we did in New York, but most everybody in this country knows.

381 Q. Do you know the fact that your bill of complaint in this State has been dismissed, I mean in Michigan?
A. That was an entirely different case. We undertook to get service on parties outside of the State by an attachment.
Q. And was that case dismissed?
A. It was dismissed because the court did not have jurisdiction as I understand it.
Q. Has the National Harrow Company brought and is there now

pending, a number of suits in which it alleges that your harrows are an infringement of its patents?

Same objection as last stated above.
Sustained. Exception.

A. We supposed they had brought six suits, but you stated to me when I was in Utica, that it was a mistake and that they had not sued us and did not make any claim against that harrow, and said that I must be mistaken in regard to the matter, as you knew nothing about it and made no claim.

Q. In point of fact are you defending and paying expense of defending some suits brought by the plaintiff against parties to whom you had sold your harrows?

A. Yes, we are.

Q. You designate your lever float spring tooth harrow, anti-trust harrow, don't you?

A. We make what we call the anti-trust harrow and one or two other lever harrows, but we do not call them floats.

Q. How many years have you lived in St. Johns, Mich.?

A. Six.

Redirect:

Q. You answered Mr. Risley that you made certain harrows but did not call them floats; why do you not call them floats?

382 A. Because they have a lever, and the trade in writing always speak of lever and float harrows.

Q. That is one is distinguished from the other in that way?

A. Yes.

Q. Do you manufacture any float spring tooth harrows?

A. We do not manufacture what they call a float spring tooth harrow.

Q. Do you have inquiries for float spring tooth harrow- and made in that way?

Objected to as incompetent.
Overruled. Exception.

A. We have quite a few inquiries.

Q. And what do you do in such cases?

Objected to as immaterial and incompetent.
Overruled. Exception.

A. We refer them to somebody that makes a float, and we bought a few.

Q. Prior to the bringing of the suits by you which you have described in answer to plaintiff's counsel, had the National Harrow Company, brought suits against persons dealing in or using the harrow manufactured by you?

A. I do not remember whether it was before or after.

Q. A float spring tooth harrow might be made in different ways than that which they have been made in, might they not?

Objected to on the grounds that it is immaterial.
Overruled. Exception.

A. Yes, sir.
Q. Why is a wheel harrow called such?
A. I suppose because it is supported by wheels.
Q. Why is a lever harrow called a lever harrow?
A. Because it has the lever for adjusting the harrow.

383 Q. Upon a float spring tooth harrow there is no special single device that enables you to designate it by such device, is there?

A. No, sir.
Q. Where it is necessary to remove each tooth and then put it back again upon the harrow in order to throw the bow of the tooth below the frame for the purpose of transporting the harrow on the bow, is it or is it not impracticable to do that in the use of the harrow?

Objected to on the ground that we are not trying the question of par-ticability.
Overruled. Exception.

A. It is not practicable.
Q. Where the teeth of a harrow are independently adjustable, how is the harrow put together and adjusted. Just describe how it is done.

Objected to on the ground as before stated.
Overruled. Exception.

A. The way of attaching the teeth to an ordinary float harrow, in order to get a certain depth, we set the frame on a couple of pieces under the frame to raise it a certain height from the floor. Then the teeth are attached and all the points rest on the floor, and in that way we get a uniform depth of all the teeth, and then they are tightened.
Q. Was there ever a harrow, spring tooth, made to your knowledge, in which the teeth on one section could be adjusted simultaneously without the use of a lever or its equivalent?
A. I have never seen any, for use, or manufactured for the trade.
Q. Were any harrows ever made to your knowledge where the teeth upon a section of the harrow or upon one tooth bar, could be adjusted without a lever when the harrow was in operation?
A. No, sir.

384 Q. Do you understand the word "float" to be a term of description or simply a word which by use of the trade has come to designate a certain class of harrows?

A. I understand the word has come into use more to designate a certain class of harrows:

Recross:

Q. What is the ordinary depth which the curved teeth are placed in their points below the under side of the frame?
A. I think we generally used about four-inch. Otherwise it

would be four inches from the bottom of the frame to the point of the teeth.

Q. Does the frame in that instance determine the depth which the teeth go into the soil?

A. I think that would depend upon the soil entirely.

Q. Assuming the soil to have been plowed and sufficiently soft to enable the teeth to readily go into the soil, what determines the depth which the teeth penetrate into the soil?

A. It is pretty hard to tell for the reason that the ordinary float harrow goes out of sight in very soft ground.

Q. Then you would term that kind of a harrow a diving harrow, wouldn't you?

A. It would make no difference what I termed it, others would term it a float.

Q. Now, suppose we assume that two harrows were made precisely alike so far as the projection of the teeth below the frame was concerned, would it make any difference whether either of the harrows had levers or no levers, so far as the working of the harrows was concerned, where the cut of the teeth was exactly the same in construction and depth?

A. It would not make any difference if the teeth were set the same depth.

385 Q. Would both of the harrow frames constructed as indicated in the last question run on the surface of the ground as harrows are ordinarily used?

A. They will run on the ground, or in the ground or above the ground. It depends upon the soil.

Q. Do you know very much about a harrow any way?

A. I have been thinking of going down to Utica to get points.

Q. Do you know the fact that you are known in the harrow trade as Windy Whipple?

Objected to as incompetent, immaterial, irrelevant and improper.

A. No.

Q. Have you been told recently by those in the trade that *that* the sobriquet by which you were known to the trade was Windy Whipple?

—. I am informed by the trade that Mr. Brinkerhoff, Mr. Risley, have stated to certain dealers and manufacturers that I was all bluff, etc., and that is the only thing I ever heard that the name was applied to me, as coming from that source.

EFFINGER E. WHIPPLE.

Subscribed and sworn to before me, this the 24th day of January, 1895.

W. A. MATTESON,
Commissioner.

Recess for one hour.

Cross-examination of ARTHUR O. BEMENT resumed at one-forty o'clock:

Q. During the past five years about what extent of territory in the United States have you shipped or sold harrows?

A. Wherever there was known to be any harrow trade.

Q. Please state in a general way the extent of territory in
386 which your harrows have been marketed during the period before mentioned?

A. Principally in Michigan, Ohio, Indiana, and the Middle and Eastern States.

Q. Have you found a market for some of your harrows in the Southern States?

A. No we have not.

Q. Have you found a market for any of your harrows on the Pacific coast?

A. Not to any extent worth mentioning.

Q. Have you sold any harrows on the Pacific coast?

A. We have.

Q. You referred to the purchase and disposition of some harrow material from Ira J. Hunt, will you please state who took that stock, if you know?

A. I do not now remember.

Q. Did G. B. Olin & Co., have a large amount of stock of harrow material on hand when their interests was bought out in the fall of '90?

A. They had some stock, I am not aware of the amount.

—. Do you know who purchased the stock of harrow material they had on hand when they went out of business.

Objected to as incompetent, immaterial and irrelevant.
Overruled. Exception.

A. It is my impression that the stock was purchased by D. C. & H. C. Reed & Co.

Q. Do you recollect whether the plaintiff or its predecessor purchased a quantity of harrow material from the Williams Manufacturing Co.

A. I don't remember the transaction referred to.

Q. Do you remember of the National Harrow Co., pur-
387 chasing a quantity of harrow material from the Walker Mfg. Co.?

A. I was not aware of that fact.

Q. After the decision of Judge Smith of Elmira, in the suit of The Clipper Chilled Plow Co., against The National Harrow Co., you referred to the fact that the contracts and papers, which had before that time been signed by parties, were destroyed. Did you also understand that they were by mutual consent canceled as well as destroyed?

A. I don't just remember how that was.

Q. Please state the purpose of the destruction of the papers as you understood it?

A. I suppose it was to wipe out the record as far as possible.

Q. Was it for the mere purpose of obliterating the record or for the purpose of terminating and canceling those contracts?

A. It is probable that it was for both purposes.

Q. Didn't you understand that it was for both purposes?

A. It is probable that it was for both purposes.

Q. Were you informed of the licensing of Blaker to build the lever harrow?

A. I knew of it in 1892 in New York, in September at the meeting of the directors.

Q. Do you remember of the Blaker license being the subject of action by the executive committee in the fall of '91?

A. I don't think I was present at any such meeting.

Q. Are you willing to testify that you did not act on the Blaker license as a member of the executive committee in the fall of 1891?

A. I should be willing to say that I don't remember about any such transaction.

388 Q. Was Blaker's lever harrow a float harrow as you understand it?

A. It was not.

Q. Please look at Exhibit 26, Blaker's License. Is the Blaker harrow described and referred to in the license contract as a float spring tooth harrow?

Objected to as incompetent, immaterial, irrelevant and the license of itself shows what is contained in it.

Overruled. Exception.

A. The license purports to be a license for the manufacture of a float, spring tooth harrow.

Q. Do you recollect that after the meeting in New York in the fall of '92 and prior to the meeting of the executive committee at Auburn, in Nov. '92, of the fact that a suit was begun by plaintiff against De Wayne B. Smith & Co., in which an injunction had been obtained restraining the defendants from selling or offering for sale a lever harrow? And was the subject of the settlement of that suit considered by the executive committee at Auburn?

Objected to same as last stated above.

Overruled. Exception.

A. I remember that there had been a suit against De Wayne B. Smith, of which he bitterly complained, but do not remember what the circumstances of the suit were.

Q. Do you remember that at the meeting of the executive committee in Auburn, when a request was made by Smith to have the injunction suit discontinued, that you made a motion, which was adopted, refusing to discontinue the suit?

A. I do not remember the circumstance you mention.

Q. When was it that you came to the conclusion that the plaintiff had no right to license parties to build lever spring tooth harrows?

A. I never had the opinion that they had any claim
389 on the control of the manufacture of lever spring tooth harrows.

Q. And so believing you sat in the executive committee at Auburn, in 1892, and voted to license everybody who then held a license, including your own company. Is this correct?

A. I voted to have the National Harrow Co. license lever spring tooth harrows.

Q. Did you, at the time you voted with others to license E. Bement & Sons and the North-Molitor Co., intend when you so voted to accept the license which the company voted to your company and the North-Molitor?

Objected to as incompetent, immaterial and irrelevant.
Overruled, exception.

A. As far as I was personally concerned I had not made up my mind what would be the best thing for either of those companies to do, and was not ready at that time to give them any advice on the subject.

Q. Did your company submit a construction of lever harrow to the executive committee for permission to manufacture it?

A. We submitted a harrow for their inspection, but never asked their permission to make the harrow.

Q. Did you make a motion in the executive committee that a number of parties, including the North-Molitor and E. Bement & Sons, be licensed to build the harrow which they had submitted, and was that motion voted on and carried?

Objected to as incompetent, immaterial and irrelevant.
Overruled, exception.

A. I have no doubt there was such a motion made and carried, but do not remember who made the motion.

Q. At the time you voted to grant E. Bement & Sons and
390 others, licenses to build lever harrows, was your harrow filed and left in good faith by your company, and did you vote in good faith to authorize it to build the harrow?

Objected to as incompetent, immaterial and irrelevant.
Overruled. Exception.

A. I could see no objection to the National Harrow Company's giving licenses to parties to make lever harrows, provided the parties saw fit to accept of the same, and knew that the National Harrow Company had no more control of the field of lever spring tooth harrows than any of a half a dozen people that I knew.

Q. Do you consider, in view of your last answer, that in voting to grant what you knew the company had no right to grant, consider that you were acting in good faith to those who did not know as much about it as you knew?

Objected to as last stated above.

A. It was my opinion that the people belonging to the National Harrow Company, knew that fact just as well as I did.

Q. Was the form of the license which was to be granted to parties, who had been voted a lever-harrow license, submitted at that

meeting and read over to the executive committee and approved by it?

A. I know that it was talked that a new license would be necessary as the old form would not cover a lever harrow, but do not remember now that any particular form for the license was submitted.

Q. Do you know the fact that most of the licensees accepted, signed, executed and delivered the lever-harrow licenses which were voted to them by the action of the executive committee at Auburn?

Objected to as incompetent, immaterial, irrelevant.
Overruled. Exception.

391 A. Personally I do not know of more than one person who took out such a license although I presume a good many did. I know some who did not.

Q. Please name those who did not.

A. E. Bement & Sons, North-Molitor Mfg. Co., Pitts agricultural works.

Q. Did you read the duplicate licenses sent your company for execution, I mean the lever-harrow licenses?

A. I probably read most of it.

Q. Was it a printed blank license form, with the name of your corporation written into the blank ready for execution?

A. I think it was.

Q. Was there a price-list, terms of sale and discounts printed in the license blanks sent you?

Same objection.

A. I do not remember, I should almost think not.

Q. Do you consider that it was honest in you to participate in granting licenses to manufacturers to build lever harrows on which they were to pay the company a dollar royalty on each harrow and your company to build lever harrows and pay nothing and yet participate in the dividends produced from these royalties?

Objected to as incompetent, immaterial, irrelevant and improper.
Overruled. Exception.

A. I think so, yes.

Q. Was the subject of licensing D. M. Osborne & Co. considered by the executive committee at Auburn in '92?

A. It was.

Q. Did you participate in the negotiations with Osborne & Co. at that time?

A. I did not.

392 Q. In September, 1890, and since that time have you to some extent manufactured and sold a harrow substantially like the one shown in your catalogue of 1894–'5 on page 88?

A. We have and for a good many years previous to that time.

Q. Looking at page 87 of the same catalogue, were you manufacturing harrows substantially like the one illustrated in Septem-

ber, 1890, and have you continued to manufacture and sell them since that time?

A. We have.

Q. Please describe the manner of attaching the tooth to the specimen of harrow which you had at Auburn which the plaintiff voted to grant you a license to build.

A. It was a curved tooth on a curved seat, attached with bolts and clip.

Q. Was it so constructed that the individual tooth was held stationary or rigid to the tooth bars?

A. When bolted down it was rigid.

Q. Have you manufactured and sold any of that style of harrow?

A. We have.

Q. When did you begin the manufacture and sale of a harrow constructed with the tooth fastening referred to in the last question and answer?

A. Probably in 1890.

Q. Have you the means of telling the number of that construction of harrow which you manufactured and sold in 1890?

A. I think we have.

Q. Did you manufacture and sell the same kind of harrow in 1891?

Objected to as incompetent, immaterial, irrelevant and not within the pleadings of this case.

Overruled. Exception.

A. We did.

393 Q. Have you the means of ascertaining the number of such harrows that you manufactured and sold in 1891?

A. We have.

Q. Did you manufacture and sell a harrow in 1892 of the construction before referred to?

Objected to same as last stated above.

Overruled. Exception.

A. We did.

Q. Have you the means of determining the number of such harrows which you manufactured and sold in that year?

A. We have.

Q. Did you manufacture and sell in 1893 harrows employing that construction of tooth attachment?

Same objection.

Overruled. Exception.

—. We did.

Q. Have you the means of determining the number of such harrows you sold in 1893?

A. We have.

Q. Did you manufacture and sell in 1894 harrows with the tooth attachment before referred to?

A. We did.

Q. Have you the means of ascertaining the number of such harrows which you sold in 1894?

A. We have.

Q. Are you now manufacturing for delivery in the year 1895 harrows embodying the construction of tooth fastening before referred to?

A. We are.

Q. What name has this harrow in the general trade?

A. The Clipper harrow.

Q. Please describe in a general way the construction and operation of the Clipper harrow referred to in the previous questions and answers.

A. A Clipper spring tooth harrow is one that has a frame
394 constructed of wood bars so arranged that they have diamond openings between the frame and at the point of junction of the various frames, a curved tooth seat is made in the wood, upon which a spring tooth, curved to fit the seat, is bolted by means of clips and bolts. It has an evener to which the team is attached and while at work it relies upon the weight of the frame and the condition of the soil and the length of the teeth below the frame to determine the depth that the teeth will penetrate the soil, and that is capable when through work, of being thrown on its back and drawn off on the bows of the teeth without doing work.

Q. Will you please describe the construction of harrow which was presented by your company, at Auburn, which the company voted to license your company to build, harrows like it?

A. I am not able to give an exact description of that harrow. It was constructed with runners into which cross-pieces were attached by means of a short arm and teeth were attached to the bar by means of a bolt. The bars were arranged to lift and lower by means of a lever, the bars describing a circle twice the length of the crank. The teeth on one section were adjusted by the lever at one time.

Q. The runners, as you term them, were built, were they not, of angle iron or steel in cross-sections?

A. The runners are built of angle steel.

Q. Did your company manufacture and sell any harrows built on substantially the plan of this harrow?

A. We did.

Q. In what year did you first build and market those harrows?

A. We built them first for the market in 1893.

Q. Have you the means of ascertaining the number of harrows of that construction which you built and marketed in 1893?

A. We have.

395 Q. Did you build and market harrows of that construction in 1894?

A. We did.

Q. Have you the means of determining the number of harrows of that construction that you built and marketed in 1894?

A. We have.

Q. Are you building those harrows for the delivery for the season of 1895?

A. We are.

Q. By what name has that harrow been known to the trade?

A. The Ajax lever spring tooth harrow.

Q. Did your house at any time change the construction of the harrow which you presented for license at Auburn in 1892, and which the company voted you might manufacture and sell by changing the manner of holding the tooth to the bars? If so please describe the change in that regard and when the change was made.

A. We now make the Ajax harrow where we bolt the tooth to the bar and also where we hold the tooth to the bar with a forked clip by means of a set-screw. I don't know when we made the change. We make them both ways.

Q. Have you the means of determining the number of harrows with the forked clip and set-screw that you have marketed since the fall of 1892?

A. We have not.

Q. Have you the means of ascertaining the number of Ajax lever harrows of both constructions that you have manufactured and sold?

A. We have the means of ascertaining the number of harrows made since we began to make them.

396 Q. Has both constructions of lever steel frame harrows been sold under the trade name of the Ajax harrow?

A. It has.

Q. By what name in the trade is the harrow known on page 88 of your catalogue?

A. It is named the Lansing spring tooth harrow.

Q. What other style and construction of curved spring tooth harrows have you manufactured and sold since September, 1890, other than wheel harrows?

A. The Steel King harrow.

Q. Is the Steel King harrow as manufactured and sold by you, in its construction illustrated on pages 85 and 86 of your catalogue?

A. It is.

Q. Have you the means of determining the number of the Steel King harrows which you have manufactured and sold between September, 1890, and the present date?

A. We have.

Q. Does your company have books in which the number and style of harrows that you have manufactured and sold, are tabulated so that the number and styles can be readily ascertained?

A. We have.

Q. Will you produce the books containing those entries, so that the tabulated list may be copied into and made a part of this deposition?

A. We will produce the information desired.

Q. That is not quite to the point. Will you allow the commissioner to compare the information which you furnish with the book to verify the accuracy?

A. We will.

Q. Did you include in your monthly reports between September,

1892, and September, 1893, the Ajax harrows which were sold between those dates?

A. We did. For the reason that as the National Harrow
397 Company was paying a dividend and we were likely to get the money back, we were willing to do so.

The complainant's counsel moves to strike out all of the answer after the words "for the reason" and including those words.

Motion denied, exception.

Q. Did your company or you for your company, receive a cash dividend in September, 1893, from the plaintiff?

A. We did.

Q. What per cent. dividend did you receive?

Objected to as incompetent, immaterial and irrelevant.

A. I don't remember the rate, 6 or 7 % I think.

Q. Did you receive a dividend on the stock held by you or your company, from the plaintiff in 1892.

Same objection.

Overruled, exception.

A. I think we did.

Q. You remember the amount of that dividend?

A. I do not.

Q. Did your company or you receive a dividend in 1891?

A. I don't know.

Q. Did you cease to make your report on and after Sept. 3d, 1893, on account of the company withholding from you anything that belonged to you?

Objected to as incompetent, immaterial and irrelevant.

Overruled, exception.

A. We stopped reporting because the company had been bought up by an outside harrow concern, and was not in the interest of the manufacturers.

398 Q. What reason, if any, did you give to the National Harrow Company, for refusing to report the harrows sold after Sept., 1893?

A. I don't think we ever stated any.

Q. Were you in the board of directors, and did you vote to grant to Edwin H. Risley, the right to purchase and assign the stock of the National Harrow Company, and its licenses to a company to be organized to buy up the business?

Objected to as incompetent, immaterial, irrelevant.

Overruled, exception.

A. I don't remember any such transaction, although I might have done so in view of the fact that we had a contract with Risley subject to his later acceptance, to pay us for our spring tooth harrow business in money.

Q. What is your recollection about having voted to authorize Mr.

Risley to purchase the harrow business of the several licensees including their licenses?

A. I don't remember any such transaction.

Q. Do you say that you did not vote for the granting of such permission?

A. My answer was that I have no recollection of any such transaction. I would not say that I didn't.

Q. You were not continued as a member of the board after the annual meeting in Sept., 1893, were you?

A. I was not.

Q. Since Sept., 1893, your company has paid no attention whatever to the license contract or done anything to recognize them in any way, have you?

Objected to as reopening the plaintiff's case and not cross-examination of the witness.

Overruled, exception.

A. We have not intentionally said or done anything to recognize or fail to recognize the company. We have simply so far as possible, remained simply neutral and said nothing.

Q. Have you a traveling salesman by the name of Forster
399 in the State of New York, and takes orders for you?

Objected to same as last above.

Overruled, exception.

A. We have.

Q. Where does Mr. Forster live when at home?

Objected to as incompetent, immaterial, irrelevant, not cross-examination, and reopening plaintiff's case.

Overruled, exception.

A. I think Lansing or Mt. Clemens.

Q. Has your company taken orders for harrows for future delivery since the opening of the harrow trade in October or November, 1894?

Objected to same as last stated above.

Overruled and exception.

A. We have.

Q. When was the North-Molitor Manufacturing Company organized?

Objected to as incompetent, immaterial, irrelevant.

Overruled, exception.

A. I think in 1890 or 1891.

Q. Who were its directors, if you remember?

Objected to same as above, also not the best evidence.

Overruled, exception.

A. A. O., G. W. and C. E. Bement, C. A. Gower, Fred Molitor, Ford North, and H. S. Bartholomew.

Q. Were the three Bements named the officers of the defendant?

Objected to as incompetent, immaterial and irrelevant.
Overruled, exception.

A. Yes, and Mr. Gower.

400 Q. What relation has Mr. North, or Mr. Molitor, or either of them sustained to your company since the organization of that corporation?

Objected to same as last stated above.
Overruled, exception.

A. Mr. North has no relation to our company whatever. Mr. Molitor is in our employ.

Q. Where have the harrows which they manufactured and sold, been built and constructed?

Same objection as last stated.
Overruled, exception.

A. They have been built in the factory of E. Bement & Sons.

Q. Have the men who have sold these harrows also sold goods for E. Bement & Sons?

Objected to same as above.
Overruled, exception.

A. They have not.

Q. Your company build and furnish these harrows and do they ship them on the order of the North-Molitor Co.?

Objected to as before.
Overruled, exception.

A. They do.

Q. Who are the officers of the North-Molitor Co. at this time? I mean directors.

A. The same as named before.

Q. What position have you occupied in the North-Molitor Co. since its organization?

A. I have been a director in that company.

Q. Who have been its officers?

Same objection.
Overruled, exception.

A. Ford North president, A. F. Molitor vice-president, H. S. Bartholomew secretary and treasurer.

Q. Where are the books and business of the North-Molitor Co. kept and carried on?

401 Objected to as incompetent, immaterial, irrelevant and not cross-examination and reopening the plaintiff's case.
Overruled, exception.

A. They have offices in the buildings of E. Bement & Sons.

Q. At the organization of the company and the election of offi-

cers at Buffalo, in the fall of 1890, was the subject of the designation of the name to be given to the harrows, the subject of discussion? I mean the meeting of directors of the National Harrow Company, when you were elected into the board of directors?

A. The question of the scope of the word "float" as applied to spring tooth harrows was discussed and whether the name applied to wheel spring tooth harrows.

Q. Was there a resolution offered and voted on at that meeting to the effect that wheel cultivators or harrows, using curved teeth, were not considered within the term "float" spring tooth harrows?

A. I don't remember that the question ever came to a vote.

Q. Was that question discussed by the parties present?

A. It was.

Q. Are you willing to swear that that question was not voted on by the directors and transcribed in the minutes of the company?

A. I am not.

Q. Would you consider a harrow having curved teeth a float harrow where the teeth could be adjusted without the use of a lever, so that the harrow could be transported right side up with the bow of the teeth projecting below the harrow frame so that the harrow rode on the bow of the teeth below the frame?

402 A. I think the construction spoken of is an impossible construction and could have no name.

Plaintiff's attorney moves to strike out the answer as not responsive and repeats the question and requests an answer to it.

A. The construction named would not be a float spring tooth harrow.

Q. Did you at the time these licenses were signed manufacture a wheel harrow which employed curved spring teeth?

A. We did.

Q. Was the frame to which the teeth were attached in your wheel harrow supported and carried on an axletree which had wheels running on the ground?

A. It was.

Q. Did you operate the teeth and the frame bars to which the teeth were attached, by means of a lever for raising and lowering the teeth bars and teeth?

A. We did.

Q. Did the frame bars in your wheel harrow ever come in contact with the ground when the harrow was in use?

A. They did not.

Q. In your opinion would the question of whether a harrow was a wheel harrow depend at all upon the question as to whether it was operated by a lever or by any other means for raising or lowering the tooth bar and teeth?

A. If there was any other suitable manner of raising the teeth and it was carried on wheels, I should see no objection of calling it a wheel harrow.

Q. In point of fact is not the distinct characteristic of the tool which was known as the wheel harrow determined by the fact the

harrow is transported and operated upon wheels running upon an axletree?

403 A. I should say that a harrow could not properly be called a wheel harrow unless it had wheels.

Q. Does the question of determining whether a harrow is a float or a non-float harrow, depend, in any degree, upon the question of whether the teeth are individually adjustable on the frame, or held rigidly to the frame?

A. I think it essential that they be adjustable to make it a float harrow.

Q. Does the question in determining whether a harrow is a float spring tooth harrow, depend upon the means provided for adjusting the teeth independently?

A. It may, or it may not according to circumstances.

Q. Suppose each tooth on the frame bars were arranged to be independently adjustable, would such a harrow be a float harrow?

A. It might and it might not according to other conditions and circumstances.

Q. Suppose the teeth in a spring tooth harrow were all made adjustable in each section, so as to elevate or depress the points of the teeth above or below the frame bars, without the use of a lever, would such a harrow be a float spring tooth harrow?

A. If other conditions were present which would be required to complete the tool, it might be a float spring tooth harrow.

Complainant's attorney moves to strike out the answer as not responsive and requests the witness to answer the question.

A. I don't know what it would be on that description.

Q. Does the question of determining whether a harrow is a float or a non-float harrow, turn upon the question as to whether the harrow can be transported on the bow of the teeth with the harrow upside down?

404 A. I should consider that an absolutely essential feature.

Q. Assuming your last answer to be correct, what difference does it make in determining whether a harrow is a float spring tooth harrow whether the teeth are held to the frame rigidly or adjustably so that the harrow can be transported bottom side up on the bow of the teeth?

A. Because that is what is meant by a float spring tooth harrow and what is required of it.

Q. Then do you wish to be understood as saying that two conditions are essential to make a float harrow: to wit, that the harrow must be built so as to be transported on the bow of the teeth, upside down, and 2nd, that the teeth must be capable of adjustment to the frame?

A. I believe both features are essential to a float spring tooth harrow.

Q. By omitting either of those conditions, would it be a float harrow?

A. I should say not.

Q. Suppose a harrow was built and the teeth arranged to be

bolted and adjusted by means of a series of holes through the tooth so as to adjust the tooth in its length and the harrow could be transported upside down on the bow of the teeth, would such a harrow be a float harrow?

A. If you have the two conditions named, you would have a float spring harrow. I mean the conditions named in the question.

Moved to strike out the answer as not responsive and a responsive answer — to the question.

Q. Does the manner of adjusting the teeth have anything to do with whether the harrow is a float or non-float harrow?

A. I believe that the manner is absolutely essential.

405 Q. Does it make any difference in classifying the harrow as either a float or a non-float harrow, whether the teeth are simultaneously or independently adjustable providing the harrow can be turned upside down and transported on the bow of the teeth?

A. It is essential that each tooth should be adjustable independently in order to be a float spring tooth harrow.

Q. Suppose that the lever attachment and connecting rod on your Ajax lever harrow were entirely omitted and the tooth bars fixed to the frame or runners, so that each tooth bar and the teeth could be independently adjusted and held in position, so that the harrow would ride on the bow of the teeth when transported. Would such a construction constitute the harrow a float harrow?

A. It would not be a float spring tooth harrow.

Q. Suppose that the lever attachments on your Ajax harrow were removed and the tooth bars so attached to the frame bars or runners that each tooth bar and teeth could be separately adjusted and held in position when adjusted, arranged so that the harrow could be turned upside down and transported on the bow of the teeth. Would such a construction be a float harrow?

A. I should not call it a float harrow.

Q. Then are we to understand that one of the indispensible elements of a float harrow, is that the individual tooth must be made adjustable individually?

A. Yes.

Q. When your Ajax harrow is in use, does the runners or outside frame run on the ground?

A. It may and may not according to circumstances.

Q. Well, in the ordinary plowed land, does the bar called the outside bar run more or less in contact with the ground?

A. It no doubt does come in contact with the ground.

Q. Is not the lever and its attachments provided solely for

406 the purpose of simultaneously adjusting all of the teeth in each half of the harrow?

A. It is not the sole purpose of it.

Q. What other purpose is a lever provided for than the adjustment of the teeth?

A. It is to hold the teeth up out of the way when the harrow is transported from the field.

Q. Is the sole office of its lever and its attachments for elevating

or depressing the working point of the tooth and holding it in its elevated or depressed position?

A. I should call that the function of the lever and its attachments.

Q. Is the lever and its attachments applied to the harrow, for the purpose of improving its operation?

A. The lever and its attachments are not applied to the harrow, but are a part of the harrow.

Q. Does the lever and its attachments do any harrowing?

A. No.

Q. Is the harrow applied to the lever or the lever to the harrow?

A. Neither one. They are each a component part and an essential part of the whole.

Q. Do you mean that by applying the lever and its connecting adjustment, that the harrow thus constructed is a whole tool?

A. If the lever and all the other component parts of the harrow are joined together, it will be a harrow.

Q. Suppose the harrow was constructed with spring teeth, so that each individual tooth in the harrow was mounted in the frame so as to be elevated or depressed by a lever mechanism, arranged so that the harrow could be turned upside down and transported on the bow of the teeth, would such a harrow be in your judgment, a float harrow?

A. It would not.

407 Q. What elements are wanting in the construction of such a harrow to make it a float harrow?

A. The element is not lacking, but it has too many elements.

Q. Please point out what the excess of element — in the harrow thus constructed.

A. One fatal element to it would be the lever.

Q. Would it in your judgment, make any difference with the classification of the harrow, whether the teeth were arranged to be independently adjustable by any mechanism, where it was so adjustable, and the harrow as a whole, could be turned bottom side upwards and transported on the bow of the teeth?

A. It would depend on the manner of the adjustment.

Q. Would the question of whether a harrow was to be classed as a float harrow or a non-float harrow depend in any degree upon the question as to whether the teeth were made adjustable by a series of holes, or by a clip which would permit the teeth to be moved, or by a block for elevating or depressing them, or by any other mechanism so long as the harrow could be turned bottom side upwards and transported? And had the independent adjustment of the teeth.

A. If adjusted in either of the first two ways, I would call it a float spring tooth harrow. If in some other way it would depend on the manner of adjustment.

Q. Suppose a harrow were constructed with curved spring teeth hung in a frame provided with a short crank arm attached to the hub of each tooth, so that the tooth could be adjusted in the direction of its length, and held in that position by a bolt running through the frame and the crank arm, the teeth always being in

position so that the harrow could be turned bottom side upward and transported. Would such a harrow be a float harrow?

A. I could not answer that question.

408 Q. Suppose a harrow was constructed with teeth fastened rigidly to a hub, the hub having a crank arm and being mounted to swing on its center in the frame so that it could be adjusted in the direction of its length, and held in that position by a bolt passing through the crank arm and the frame, the teeth being always in position to enable the harrow to be transported on the bow of the teeth upside down. Would such a harrow be a float harrow?

A. Am not able to give a name to the tool described.

Q. Does your company own any patents covering any features of your Ajax lever harrow?

Objected to as incompetent, immaterial, irrelevant, not cross-examination.

Overruled. Exception.

A. We do.

Q. How many patents does your company own which relate to or cover any feature of the Ajax harrow?

Same objection.

Overruled. Exception.

A. We have one which covers the essential features and another which we just got word today had been allowed by the Patent Office. The one which we have is the one purchased from the Grand Detour Plow Co.

Q. How many applications for patents relating to your Ajax lever harrow, you have pending in the Patent Office?

Objected to as incompetent, immaterial, irrelevant, reopening the plaintiff's case and not cross-examination.

Overruled. Exception.

A. I don't now remember how many we have there.

Q. Have you a number?

A. I do not know. That is a part of the business I do not pay any attention to.

409 Q. Have these patents you have referred to been assigned to your company?

Objected to as last stated above.

A. The Grand Detour patent has been. With reference to the others I am unable to say.

Q. Have you arranged with the applicant to use these patents or inventions in building your Ajax lever harrow?

Same objection.

Overruled. Exception.

A. If we haven't, we no doubt will.

Q. How much stock of the National Harrow Company was issued

to you on the award of stock by Messrs. Cookinham & Howard as arbitrators?

Objected to as incompetent, immaterial and irrelevant.
Overruled. Exception.

A. I should have to guess at that, but think it was $29,300.00.

Q. After the arbitrators had made their award, and the stock authorized to be issued by the award had been sent to your company, did you meet Mr. Childs and Stevens at Detroit on the subject?

Same objection as before.
Overruled. Exception.

A. I did.

Q. Did you at that time inform them that you would not submit to the arbitration, and did you say in that connection that you would not play unless they gave you more?

Objected to same as above.
Overruled. Exception.

A. I think that is the impression I made upon their minds.

410 Q. Did you then arrange to go on providing you were given sixteen thousand dollars in stock in addition to the amount awarded?

A. I accepted sixteen thousand dollars additional stock as a settlement of our differences.

Q. At the time the sixteen-thousand-dollar stock was delivered to you, did you sign a paper?

A. Yes.

Paper shown the witness.

Q. Is that the signature of E. Bement & Sons, by you as president?

A. It is.

Q. Is that the paper?

A. It is.

Plaintiff offers the paper and asks to have it marked for identification only.

Defendant's counsel objects to any paper being marked for identification unless he is permitted to examine the paper that he may ask the witness in regard to the paper, before the commissioner.

Paper marked "Plaintiff's Ex. 129, for identification only, W. A. M."

Defendant's counsel gives notice that he will move to strike out all evidence in regard to the last exhibit unless the paper is put in evidence before the commissioner, that he may be permitted to see the same and to interrogate the witness with reference thereto.

Q. After getting the sixteen thousand dollars of stock, have you made any efforts to acquire or purchase the La Dow patents?

A. We have been steadily having lawsuits with him ever since, and have succeeded in wresting one patent from him which we consider of vital importance.

Moved to strike out the answer as it is not responsive.

Q. You have then, now pending, a suit in the circuit court of the United States for the northern district of New York the pur-
411 pose of which is to annul and cancel a license which he granted to your company to build the Steel King harrow?

Objected to as incompetent, immaterial, irrelevant.
Overruled. Exception.

A. We have such a case.

Q. Did your company hold its license from La Dow, prior to the organization of the National Harrow Company of New York?

A. We did.

Q. Was that license assigned to the National Harrow Company of New York?

Objected to as incompetent, immaterial, and irrelevant.
Overruled. Exception.

On the day when the arbitration begun at Utica?

A. I think it was assigned to the National Harrow Company.

Q. Did that license contract relate to the Steel King harrow that your company afterwards built?

A. It did.

Redirect:

Q. The license contract which you had with La Dow was reassigned to your company by the National Harrow Company, was it not?

A. It was.

Q. When you claimed that you were entitled to more stock of the National Harrow Company than awarded to you by the arbitrators, you claimed it upon the ground that you thought the La Dow patents covered the principle of holding a spring tooth edgewise, and also a harrow frame of zigzag form, did you not?

A. We did.

Q. Mr. Bement, there was no new assignment of patents to
412 the National Harrow Co., of New York, by the licensees, where they, after Judge Smith's decision in the chilled-plow case of Elmira?

A. There was not.

Q. Is the word "float" applied to harrows a descriptive word, or is it a word used by the trade to designate a class of harrows?

A. It is not a descriptive word, but is the name of a specific kind of harrow.

Q. Do you know who prepared the lever license of the National Harrow Co.?

A. I don't think I do.

Q. Did you have any part in preparing the form of that license?

A. I did not.

Q. When you voted in the directors' meeting and also in the executive committee meeting of the National Harrow Co., you acted as an officer of that company, did you not, and not as president of the defendant?

A. I did. I acted as a director of the National Harrow Co., and not as president of E. Bement & Sons.

Defendant's counsel requests plaintiff's counsel to permit him to see exhibit of plaintiff No. 129, for identification, for the purpose of interrogating the witness with reference thereto.

The plaintiff's counsel declines at this stage of the case to give the inspection requested.

Q. When Olin & Co., were bought out by the National Harrow Co., they transferred certain patents or rights in patents, to the company did they not, for the consideration paid them?

A. They did.

Q. Did you ever see the Blaker license before today?

A. I never did.

Q. Is the license to Blaker shown you today, the ordinary license of the National Harrow Co., of New York, and the only way
413 the Blaker harrow is specifically referred to is in the written portion which describes the harrow, filed with the secretary of that company?

A. It is.

Q. The voting in the executive committee at Auburn, in November 1892, to license lever harrows, was in pursuance of a previous arrangement made at the September meeting was it not?

A. It was.

Q. After those licenses had been voted it was optional with all of the then licensee- to accept or reject them, was it not?

A. It was.

Q. Your company transferred to the National Harrow Co., patents and rights under patents, in consideration of the stock issued to you, did it not?

A. It did.

Q. Is it a wheel upon a wheel harrow that gives the name to such a class of harrows?

A. It is.

Q. And what is it that gives the name, I mean in the trade, that gives the name "lever spring tooth harrow"?

A. The lever.

Q. Was there ever a spring tooth harrow made, to your knowledge, in which the teeth upon one section of the harrow was simultaneously adjusted except it had a lever?

A. I never heard or saw such a tool.

Q. Upon a spring tooth harrow, known as a float, is there any special single device that enables you to designate it by such device?

A. There is not.

Adjourned until seven-thirty o'clock.

Mr. FREDERICK MOLITOR, being duly sworn as witness for the defendants, testified as follows:

414 Q. Where do you reside, what is your age, occupation, and how long have you been engaged in the business which you are now in?

A. In Lansing, Mich., 35 years old, assistant superintendent at E. Bement & Sons', have been there almost twelve years.

Q. Are you familiar with the manufacture and dealing in spring tooth harrows?

A. I am.

Q. Have been for how long?

A. For the last ten years.

Q. Do you know what is considered by the trade a float spring tooth harrow?

A. I do.

Q. You may describe it?

A. A float spring tooth harrow known to the trade ever since I have been connected with it, is a harrow made with a rigid frame, and with adjustable teeth, curved spring teeth, and with the peculiar feature that it can be and always is transported by being turned on its back and hauled along on the curve of the teeth.

Q. Do you know the harrow manufactured by defendant known as the Ajax lever harrow?

A. I do.

Q. Is that a float spring tooth harrow?

A. No it is not.

Q. Is any lever harrow considered by the trade a float spring tooth harrow?

Objected to on the ground that the question is immaterial and incompetent.

A. It is not.

Q. Would you consider any lever harrow a float spring tooth harrow?

Same objection continued.

Overruled, exception.

A. I would not.

415 Q. When did you first see or hear of a lever harrow being in the market?

A. In 1892.

Q. Is the word "float" used in connection with harrows, a descriptive word, or is it a word that in the trade, has become a term to designate a certain class of harrows?

A. It is not descriptive, merely grown up with the trade on the harrow and became a general name for that harrow.

Cross-examined by Mr. RISLEY:

Q. Will you define what you understand by the word "generic"?

A. It is a word that is appropriate to all individuals or units of a certain kind or species.

Q. Does the word "generic" relate to a general classification of any particular thing to which it is applicable?

Objected to as incompetent, immaterial, irrelevant and improper and not cross-examination.

Overruled, exception.

A. I think so.

Q. Applying that definition to the word "harrow" would that be sufficiently generic to embrace every style and construction of tools used in harrowing the ground? I mean the word "harrow"?

A. It would not.

Q. Please define what you would consider within the description embraced in the word "harrow"?

Objected to as incompetent, immaterial, irrelevant and not cross-examination.

Overruled. Exception.

A. I could not answer you in any way except what I have absorbed from my agricultural implement business.

416 Counsel for defendant requests the commissioner to instruct the witness that if he does not understand the question he is not obliged to answer until it is made intelligible to him.

Counsel for the defendant has heard the commissioner say that he declines to instruct the witness as requested.

Q. What do you understand to be the meaning of the word "harrow"?

A. The noun harrow, a tooth for cultivating the ground.

Q. What do you understand by the words "spring tooth harrow"?

A. A harrow with flexible spring teeth of steel.

Q. Please state your understanding of the word "float," not applied to a harrow.

A. It is the act of one substance lighter than another remaining on the surface.

Q. Did you ever see or know of a spring tooth harrow of any kind other than a wheel harrow, but that would remain on the surface of the ground?

A. I don't know of anything that would not remain on the surface of the ground.

Q. Leaving out of mind the trade custom would it not be true, that any harrow other than a wheel harrow, that moved along on the ground, would be a harrow which might be designated as a float harrow?

A. No.

Q. Suppose you took a spring tooth harrow and turned it over and drew it along on the surface of the ground, would it not float when it was drawn?

A. No, it would not float.

Q. What would it do if drawn on the bow of the teeth?

A. It would drag or slide along but not float.

417 Q. Then, as a matter of fact, in your mind, the word "float" would be an improper designation of the act of moving the harrow on the ground on the bow of the teeth? Would it be any more an improper designation of a harrow that could be moved along on the ground on the frame bars, where the teeth did not touch the ground?

A. I don't think it would.

Q. Assuming that the word "float" as applied to a harrow, was properly applied to it, would it not be as properly to apply that term of a harrow that could be moved on the bow of the teeth, as on the frame of the teeth where the teeth did not come in contact with the ground?

Objected to as incompetent, immaterial, irrelevant and not cross-examination.

Overruled. Exception.

A. They would both be improper.

Q. Do you say as a matter of fact, that the word "float" would be improperly applied to any harrow?

A. I do.

Q. Would you call a wheel harrow a float harrow?

A. I would not.

Q. Would it, in your mind, make any difference whether the harrows was run on the bows of the teeth in transporting it as to whether the harrow was right side up or bottom side up?

A. It would.

Q. Would there be any difference in the facility of transporting a harrow whether it ran on the bow of the tooth projected below the frame or whether it ran on the bow of the tooth above the frame with the harrow bottom side up? Would not in either case the same element *would* be employed in transporting the harrow.

A. I don't think there is any difference in the facility and I think the same element would be employed.

418 Q. Would the question whether a harrow was transported on the bows of the teeth projecting below the frame, or transporting it upon the bows of the teeth bottom side upward, determine whether the harrow was a float or a non-float harrow?

A. Yes, sir.

Q. If the bows projected below the frame, and was transported, you would say that was not a float harrow.

A. I would say it was not a float harrow.

Q. If the harrow was transported on the bows of the teeth bottom side upwards, would you say that was a float harrow?

A. Not that fact alone.

Q. Then, would the element of having the teeth independently apjustable alone determine whether the harrow was a float or a non-float harrow?

A. No sir.

Q. Would the element of having the teeth on one of the separate bars adjustable on the bars, or with the bars, determine whether the harrow was a float or a non-float harrow?

A. It would.

Q. Suppose a spring tooth harrow was built on the principle of the Ajax harrow, with the lever and its attachments, omitted, and the independent tooth bars so attached to the frame bars, that each tooth bar could be separately adjusted, would a harrow so constructed be a float or a non-float harrow?

A. It would be a non-float harrow.

Q. Suppose the harrow described in the last question was so constructed that it could be turned bottom side upward and transported on the bows of the teeth, would such a harrow be a float harrow?

A. I think not.

Q. Suppose all of the teeth in a curved spring tooth harrow
419 are rigidly bolted to the frame, so that the harrow can be turned upside down when transported, would such a harrow be a float harrow?

A. Not in my opinion.

Q. Are you familiar with the construction of the defendant's Clipper harrow?

A. I am.

Q. Are the teeth of those harrows bolted to the frame bars?

A. They are not.

Q. Then, if Mr. Arthur O. Bement testified that they were bolted to the wood frame bars, was he correct in that statement?

Objected to as incompetent, immaterial and improper, not cross-examination.

Sustained. Exception.

A. I think not.

Q. Has the method of independently adjusting the teeth in a curved spring tooth harrow, in the direction of their length, anything to do in determining whether the harrow is a float or a non-float harrow?

A. Yes, sir.

Q. Then, do I understand you to mean that to constitute a spring tooth harrow a float harrow, that the individual teeth must be arranged to be individually adjusted in the direction of their length and the harrow must be capable of being turned upside down. Am I right in this?

A. You are.

Q. Providing those two elements are found in a spring tooth harrow would it make any difference what means were employed for adjusting the teeth, to determine its classification?

A. It might.

Q. And it might not?

A. Yes.

Q. So that the harrow which had the individual adjust-
420 ment of the teeth, and could be turned upside down, and drawn on the bows of the teeth for transportation, might or might not be a float spring tooth harrow?

A. I cannot conceive of any that would not be a float spring tooth harrow.

Q. Now I repeat the question. Suppose a harrow is provided with means for adjusting the teeth, would that be one of the elements to make a float spring tooth harrow?

A. Yes.

Q. Now, does the means employed for independently adjusting the teeth, providing the harrow can be run on its teeth upside down, have anything whatever to with determining whether the harrow has one of the elements of a float harrow?

A. No.

Q. Would you term any harrow which had independently adjustable teeth, no matter by what mechanism the teeth are made adjustable, where the harrow could be turned bottom side up and transported on the bows of the teeth, a float harrow?

A. I think I would.

Q. Then, if you were to accurately designate what you term a float spring tooth harrow in the trade, it would be a curved spring tooth harrow run upside down on the bows of the teeth with independently adjustable teeth, is this correct?

A. Yes if it had rigid frame.

Q. You are in the employ of the defendant, are you not?

A. I am.

Q. And are you also a director in the North-Molitor Co.?

421 Objected to — incompetent, immaterial, irrelevant and not cross-examination.

Overruled. Exception.

A. I am.

Q. Is that company manufacturing and marketing a lever harrow?

Objected to as incompetent, immaterial, irrelevant and not cross-examination.

Overruled. Exception.

A. Yes sir.

Q. Is that company licensed by the National Harrow Co. to manufacture and market a float spring tooth harrow?

Objected to same as last above.

Overruled. Exception.

A. Yes sir.

Q. Has that company reported and paid royalty on its float spring tooth harrows marketed between September 1893 and the present time?

A. It may for part of the time, but do not remember.

Q. Well you know the fact, do you not, that your company is in litigation with the plaintiff on account of refusal to perform the conditions of the licensed contract?

Objected to as incompetent, immaterial, irrelevant and not cross-examination.

Overruled. Exception.

A. I do.

Q. Is your company also in litigation with the plaintiff on account of manufacturing and selling lever harrows in violation of your existing license?

A. I think that is the complaint.

Q. Then, as a matter of fact you are interested in establishing if you can, by your evidence, the proposition that a lever harrow which when used the frame runs along on the ground, is not a float harrow?

A. I suppose I am.

422 Q. Do all lever harrows run more or less along the surface of plowed land, when the harrow is in use?

A. They do.

Q. Is there any other function performed by the use of the lever and its connecting mechanism than that of raising or lowering the working points of the teeth, and holding them in the position to which they are adjusted?

A. No, I think not.

Q. Have you ever been on the road to sell spring tooth harrows?

A. I have.

Q. When?

A. Eight or nine years ago, about.

Q. Well within the past eight years your business has been that of superintending or working in the manufacturing establishment of the defendant, as manufacturer?

A. Yes, except short trips on the road.

Q. When did you take the last short trip on the road?

A. A few months ago.

Q. What did you try to sell when you were on the road?

A. Generally our whole line of implements.

Q. When was it that the idea came into your mind a lever harrow was not a float harrow?

A. I have always had that opinion.

Q. With that opinion in mind, why did your company report and pay royalty to the plaintiff, on the lever harrows which your company sold in the year 1892?

A. We did not, to my knowledge.

Q. Did you not swear to reports by your company, of harrows sold in the year 1893, up to September 1st, and did not your lever harrows go into those reports?

A. I did, and they did not.

423 Q. Then the reports which you did make were the reports on your non-lever harrows?

A. Yes, sir.

Redirect:

Q. You never had a lever license?

A. Never.

Q. In answer to Mr. Risley's question as follows: "Now, does the means employed for independently adjusting the teeth, providing the harrow can be run on its teeth upside down, have anything whatever to do with determining whether the harrow has one of

the elements of a float spring tooth harrow?" And you answered "No." That is you wish to be understood as saying that a harrow thus constructed might have some and not other essentials, of a float spring tooth harrow. Is that correct?

A. Yes, sir.

Q. Again, to Mr. Risley's question as follows: "Would you term any harrow which had independently adjustable teeth no matter by what mechanism the teeth are made adjustable, where the harrow could be turned bottom side up and transported on the bows of the teeth, a float spring tooth harrow?" You answered "I think I would." From the facts assumed in that question how could you tell whether it was a float spring tooth harrow or not, without knowing what the mechanism was by which the teeth were to be adjusted?

A. I could not tell absolutely, but think I would.

Q. Did you ever know such a harrow in the trade as described in that question?

A. Question withdrawn.

Q. Do you know of any harrow known as a float spring tooth harrow in the market, in which the teeth are bolted rigidly to the frame so that they are not adjustable?

A. I do not.

424 Q. Did you ever see the Walker or the Sweet harrows?

A. No. I have not.

FREDERIC MOLITOR.

Subscribed and sworn to before me, this the 25th day of January, 1895.

W. A. MATTESON,
Commissioner.

CLARENCE E. BEMENT, witness for defendant, being duly sworn, testified as follows:

Q. Where do you reside, what is your occupation and how long have you been engaged in the business in which you are now in?

A. I reside in Lansing, Mich., am supt. of E. Bement & Sons, and have been engaged in that business since 1878.

Q. Are you also a director of E. Bement & Sons?

A. I am.

Q. During all this time have you been familiar with the manufacture and sale of spring tooth harrows?

A. Yes, sir, I have.

Q. Do you know what is considered by the trade a float spring tooth harrow?

A. Yes, sir, I do.

Q. You may describe it.

A. A float spring tooth harrow as known to the trade is a harrow whose teeth are fastened to the frame either rigidly or adjustably, but only capable of adjustment independently. The teeth in all

cases projecting below the bottom of the frame. I might also add that it is a harrow capable of being thrown on its back for purposes of transportation.

Q. You are acquainted with the harrow manufactured by the defendant, and known as the Ajax lever harrow, are you not?

A. Yes, sir.

425 Q. Is that harrow a float spring tooth harrow?

A. No, sir.

Q. Is any harrow having a lever for adjusting the teeth, known to the trade as a float spring tooth harrow?

A. No, sir.

Q. Is the word "float" a descriptive word or is it a word that by usage in the trade has come to mean a certain class of harrows?

Objected to on the grounds that the evidence is improper and incompetent.

A. The word "float" is a term applied to a certain class of harrows and is not a descriptive word in this case.

Q. You have manufactured a harrow known as the Lansing harrow at some time, haven't you?

A. Yes, sir.

Q. Is that a float spring tooth harrow, or a coil spring tooth harrow, or what do you call it?

A. We have always called that harrow a coil spring tooth harrow.

Q. Just describe it.

A. The Lansing spring tooth harrow is a harrow with a rigid tooth fastened to the top of a bar by means of an eye in the upper end, through which runs a bolt at the same time that the bolt passes through two sections of a coiled spring on either side of the tooth the loop connecting the two coils passing over the tooth at a distance of two or three inches below the eye.

Q. What in that case gives the tooth its vibratory motion, if anything?

A. The elasticity of the coil conveyed to the tooth by means of a loop connecting them. I mean the coils.

Q. Did you ever make any report to the National Harrow Company under any license contract of the sales of the Lansing spring tooth harrows?

A. So far as I know we never did.

426 Cross-examined by Mr. RISLEY:

Q. For how many years has the word "float" been known to you as applied to a certain class of harrows?

A. To the best of my knowledge, ever since I have been acquainted with spring tooth harrows. I should think for at least twelve years.

Q. During that twelve years has there been a type of harrows known as the wheel harrow employing curved spring teeth?

A. Yes, sir.

Q. What has been the designation of that class of harrows?

A. Wheel harrows or cultivators.

Q. Up to the year 1892, when lever spring tooth harrows came on to the market, was the designation of wheel and float as applied to the two classes of harrows employing curved teeth, come into general use as a designation of these classes of harrows?

A. Yes, sir.

Q. When the lever harrow came into use in 1893 that class of harrows since that time have been classified as lever harrows, have they not, in general trade?

A. Yes, sir.

Q. In describing the class of harrows that you term "float" would it in your opinion in order to make the classification, be of any importance whether the teeth were held rigidly on the frame, or whether they were held in the frame so that they could be independently adjustable?

A. No, sir; it would not.

Q. Then, when you state that the float harrows as you have designated them, can be turned bottom side upwards and transported on the bow of the teeth, that that relates simply to one function which the harrow performs in its use?

427 A. Yes, sir: that is one of the qualities of a float harrow.

Q. Have you ever known of the fact of the sale of the harrow manufactured by De Wayne B. Smith & Co. of Utica, known as a spring tooth harrow, during the past four or five years?

A. No, sir; I have no recollection of knowing anything of the kind.

Q. Have you known the fact that a harrow employing the curved teeth sold on the market known as the Walker harrow?

A. I think I have heard of such a harrow.

Q. Have you heard of the Clipper Chilled Plow Company spring tooth harrows of Elmira, N. Y.?

A. Yes, sir.

Q. Have you ever seen their harrow?

A. No, sir.

Q. Did you mean to be understood as saying that the word "float" applied to a class of harrows, and not to a mere description of the harrow?

A. I did.

Q. If you were right in your last answer, is it of any sort of importance in determining the class to ascertain the function performed by the harrow, in your opinion?

A. I don't understand the question.

Q. Are you clear that the adjustability of the teeth on the harrow had nothing to do with designating the class of harrows as "float"?

A. I am clear, that the independent adjustability of the teeth has nothing to do with the class of harrows as "float."

Q. So that you would consider any harrow employing curved teeth where the teeth were rigidly secured to the frame a float harrow?

A. I would although this is a modification of the original form of the harrow.

428 Q. Would it be your mind that the modification of the form of the harrow, would have anything to do with its classification as a float?

A. Not unless that modification was radical.

Q. Suppose a curved spring tooth harrow was made with the teeth bolted to rigid frame bars, and projecting attachable and detachable shoes were provided so that the harrow could be elevated by bolting the shoes to the frame bars, so that the harrow could be transported from field to field on the shoes without working the harrow teeth in the soil what classification of harrow would that be termed, whether float or non-float harrow?

A. I should not be able to classify a harrow of that kind.

Q. Suppose the tooth bolted to the frame bars enabled the harrow when turned bottom side upward, to run on the bow of the teeth, what would you then designate the harrow, whether float or non-float? I refer to the same description of harrow designated in the previous question.

A. I could only answer that question by saying that so far as I know every harrow in the market designated as a float harrow can be thrown on its back so as to run on the bow of the teeth for transportation. I cannot classify it.

Q. Suppose a spring tooth harrow was made with rigid frame bars with the curved teeth rigidly bolted to the frame bars so the harrow could be transported on the bows of the teeth upside down, would you classify such a harrow a float harrow?

A. Yes sir, I would.

Q. Suppose that there was bolted to each section of the frame bars rigidly, shoes which projected below the points of the teeth so that when the harrow was turned right side up, it could be transported on the shoes, would such a harrow be a float harrow?

429 A. I don't think I would be able to classify that kind of a harrow.

Q. Do you think the bolting of some pieces of iron onto a float spring tooth harrow, which were provided solely for the purpose of assisting in transporting the harrow from field to field, would be such a radical departure as to change the class of harrows which had been known for years in the trade as floats?

A. No sir, I do not.

Q. Then what is the difficulty in classifying as a float the harrow described in the three preceeding questions?

A. The difficulty is that I am not acquainted with any such form of harrow, and have no knowledge of the trade designation thereof.

Q. You are entirely familiar with your Clipper harrow, are you not?

A. Yes sir.

Q. Is that a float harrow?

A. Yes sir.

Q. Is your Steel King harrow a float harrow?

A. Yes sir.

Q. Now suppose you provided shoes to be bolted solid to the frame bars of either of those harrows so that when the shoes were put on the harrow and bolted, the harrow could be transported by riding on the shoes so that the points of the teeth would not engage the ground, would the shoes change the classification of those harrows from a float to anything else?

A. I don't see that it would.

Q. Are the teeth on both of those harrows made adjustable in the direction of their length?

A. Yes, sir.

Q. Suppose instead of taking off the shoes which I have before referred to on either the Steel King or the Clipper harrow, they are left on, and the teeth adjusted so that their working points
430 would enter the soil when the harrow was put in use, would the harrow still be a float harrow?

A. I think that would be a radical modification of a float harrow which might take it out of that class.

Q. Won't you please point out how any element whatever has been added to the harrow which you have before classified as a float, to take it out of the classification of floats?

A. There has been added an element additional to the frame of a float harrow, regulating the depth of the teeth.

Q. Does the frame of all float harrows in a greater or less degree run on the surface of the soil when the harrow is in use?

A. Yes, sir.

Q. Does the frame of all lever harrows more or less run on the surface of the ground to a certain extent.

A. It does to a greater extent on the lever harrow than on the float.

Q. Would you consider any spring tooth harrow where the teeth were adjustable individually in the direction of their length a float harrow?

A. That alone would not make it a float harrow; no, sir.

Q. Would the individual adjustability of the teeth and the element that the harrow could be turned bottom side upwards, for transportation, make the harrow a float harrow?

A. I believe it would.

Q. Suppose that two teeth could be adjusted at one time, and the harrow turned over and transported on the bow of the teeth, would the harrow still be a float harrow?

A. It might, and it might not.

Q. Has your company manufactured for the North-Molitor Company, lever spring tooth harrows since 1892?

431 Objected to as incompetent, immaterial, irrelevant.
Overruled, exception.

A. No.

Q. Who has manufactured the lever spring tooth harrows marketed by the North-Molitor Company?

Objected to as incompetent, immaterial, irrelevant, and not cross-examination.

Overruled, exception.

A. E. Bement & Sons, since the North-Molitor Company, had a lever spring tooth harrow, but that was after 1892.

Q. About when did the defendant begin the manufacture of a lever spring tooth harrow for the North-Molitor Company?

Same objection as last stated.
Overruled, exception.

A. January or February of 1893.

Q. Please state the number of those lever harrows which you manufactured for the North-Molitor Company, as near as you now remember?

Same objection.
Overruled, exception.

A. I have absolutely no knowledge of even the approximate number.

Q. Have you the means of ascertaining the number from the books of your company?

A. Yes, sir.

Q. Will you ascertain the number so that you can testify to it before closing your deposition?

A. It runs up into the hundreds or thousands.

Q. Do you know the fact that the North-Molitor lever harrow was not and is not licensed by the plaintiff?

Objected to as incompetent, immaterial, irrelevant and not within the pleadings of the case.
Overruled. Exception.

432 A. I was not aware of that fact until within the last six months.

Redirect:

Q. Is the spring tooth harrow business of defendant a large or a small portion of the business of the defendant?

A. Comparatively a small portion.

Q. In answer to the question put by plaintiff's counsel as follows: "Are you clear that the adjustability of the teeth on the harrow had nothing to do with the designation — the class of harrows as float?" To which you answered, "I am clear that the independent adjustability of the teeth has nothing to do with the class of harrows as float." Do you mean to be understood by that answer that if all the teeth upon a section or upon a bar were adjusted simultaneously that that would have nothing to do with designating the harrow as a float spring tooth harrow?

A. No, sir.

Q. You also answered counsel, in connection with the above answer as follows: "So that you would consider any harrow employing curved teeth, where the teeth were rigidly secured to the frame, a float harrow." To which you answered, "I would although this is a modification of the original form of the harrow." In mak-

ing that answer do you exclude all idea of a lever or its equivalent?

A. I did, as Mr. Risley was asking me about float harrows.

Q. In answering Mr. Risley's hypothetical questions, do you exclude every fact except those stated in the question itself?

A. Yes, sir; I did.

Recross:

433 Q. In operation assuming the teeth of a float and a lever spring tooth harrow to be set the same depth below the frame bars, would the work done by the two harrows be substantially the same?

A. Not in the harrows I am acquainted with.

Q. You think then that the same number of curved teeth projecting the same distance below the frame bars on the two classes of harrows, that the harrowing of the soil would be different, do you?

A. I know it would in the harrows of the two classes we make.

Q. Both are made to operate in harrowing the soil are they not?

A. Yes, sir.

Q. And the only use to which either of them can be applied, is to harrow the soil, is it not?

A. Yes, sir.

CLARENCE E. BEMENT.

Subscribed to and sworn to before me, this the 25th day of January, 1895.

W. A. MATTESON,
Commissioner.

WALTER A. NEWTON, witness for the defendants, being duly sworn testified as follows:

Q. Where do you reside, what is your age, occupation, and how long have you been engaged in the business which you are now in?

A. Forty-one years of age, reside at Lansing, Mich., been in the agricultural implement business fifteen years, at Lansing.

Q. During that time have you dealt in spring tooth harrows?

A. Yes, sir.

Q. Are you familiar with the trade?

A. Somewhat.

434 Q. Do you know what is considered in the trade a float spring tooth harrow?

A. I do.

Q. You may describe it.

A. It is a harrow with curved teeth fastened to a bar in the frame that may be adjusted to certain depths in the ground. The teeth I mean, and the harrow can be turned over on the back and be drawn off on the back of the harrow?

Q. Do you know the harrow manufactured by defendant, called the Ajax lever harrow?

A. Can't say I know anything about it.

Q. You know lever harrows that are in the market, do you not?

A. Yes he knows the lever harrows in the market or some of them.

Q. How are lever harrows known in the market? By what designation?

A. Lever harrows.

Q. Are any lever spring tooth harrows known to the trade as float spring tooth harrows?

A. I never heard of any.

Q. When did you first see or hear of a lever spring tooth harrow in the market?

A. I think that the first I handled was two years ago, in 1892.

Q. Do you handle the harrows of the defendant?

A. I do not, except I have had two or three of their harrows.

Q. Whose spring tooth harrows have you handled?

A. D. C. and H. C. Read & Company, Kalamazoo, Mich.

Cross-examined by Mr. RISLEY:

Q. Did you ever know of the word "float" being applied to any spring tooth harrow?

435 A. We have always called a plain harrow a float harrow.

Q. That name has followed it since you knew anything about the harrow?

A. Yes.

Q. Do you know harrows employing curved teeth mounted on wheels, with an axletree and a tongue?

A. Yes, I do, with an S-shaped tooth, spring tooth.

Q. What designation has that class of harrows in the market?

A. Either a wheel spring tooth harrow or a mounted spring tooth harrow.

Q. Are all that class of harrows provided with a lever for raising or lowering the frame bars and the teeth?

A. All that I am acquainted with are.

Q. Do all wheel spring tooth harrows have levers for raising and lowering the tooth bars and the teeth?

A. All that I am acquainted with have.

Q. Does the word "float" as applied to a harrow, describe the class of harrows as distinguished from wheel harrows?

A. Yes sir.

Q. Does the question whether the teeth of a curved spring tooth harrow is made adjustable on the frame or bolted solidly to the frame, make any difference in classifying the harrow as a float harrow?

A. No I don't think it would.

Q. Then you would classify a curved tooth harrow if the teeth were bolted rigid to the frame as a float frame?

A. I think it would be classed as a float harrow.

Q. Would you classify curved teeth harrows where the teeth are made individually adjustable on the frame as a float harrow?

A. Yes, I think so.

436 Q. Suppose the frame bars to which the teeth were attached were provided with means for independently adjusting all the teeth on each bar separately, would that be a float harrow?

A. Yes sir.

Q. In your mind does the question of the means employed for adjusting the teeth have anything to do with classifying the harrow as a float or a non-float harrow?

A. A harrow could be arranged so the teeth could be adjusted without a lever, and be a float harrow.

Q. Does the float harrow as you have always understood it, run on the surface of the ground when the harrow is in use?

A. Ordinarily.

Q. Is it not a fact that for ordinary uses the harrow in plowed land, that the under side of the frame bars of a float harrow, run on the surface of the soil and control the depth to which the teeth run in the soil?

A. That is so generally.

Q. Does the frame bars of a lever spring tooth harrow so far as you know, run on the surface of the ground when the harrow is in use?

A. Yes.

Q. Please define your understanding of the word "float" as applied to a harrow.

A. As I understand it, the word float means to run along on the ground without doing any work.

Q. What would you understand broadly by the word "harrow"?

A. An instrument for harrowing up the soil.

Q. What would you understand by the word-, spring tooth as applied to harrows?

A. An elastic spring tooth.

Q. Are you one of the parties interested in the North-Molitor Co.?

A. No sir.

437 Q. Suppose wheel harrows employing curved spring teeth had been made and used as wheel harrows for a long period of years, where no means were provided for raising and lowering the frame bars, and such a harrow was provided with a lever, for raising and lowering it, would the lever in your mind change that harrow from a wheel harrow to anything else?

A. Objected to as incompetent, immaterial, speculative. Overruled. Exception.

A. It would still be a wheel harrow.

Q. The lever applied to the harrow in the last question would simply make it a lever type of the same classification, wouldn't it?

A. It would make it a lever wheel harrow, or mounted harrow, certainly.

Q. Would it make it a different type of the same classification of harrow?

A. I think it would.

Q. The only object and purpose of a lever on either a wheel or a float spring tooth harrow, is to adjust and hold in position when

adjusted, the working points of the harrow teeth. Is this correct? I mean the teeth in each section of the harrow?

A. Yes.

Redirect:

Q. One purpose of the lever upon a lever spring tooth harrow is to adjust all the teeth upon a section simultaneously, is it not?

A. It is.

Q. It is also for the purpose of adjusting them when the harrow is in operation?

A. Yes.

Q. Is not that the great advantage of the lever harrow?

A. It is.

438 Q. In answer to the following question put by plaintiff's counsel, viz: "Does the word 'float' as applied to a harrow, describe the class of harrows as distinguished from wheel harrows." You answered "Yes, sir." Does it not also describe a float spring tooth harrow as distinguished from a lever harrow?

A. Yes, sir.

Q. You also answered the following question put to you by the plaintiff's counsel, viz: "Then you would classify a curved tooth harrow if the teeth were bolted rigidly to the frame, as a float frame." To which you answered, "I think it would be classed as a float harrow." I now ask you how you could determine from the facts assumed in the question whether it was a lever or a float harrow?

A. I supposed in the question he referred to a float harrow.

Q. Then if such a harrow had a lever, it would not be a float harrow would it?

A. No.

Q. If any harrow had curved spring teeth and the teeth were individually adjustable on the frame, could it be a float harrow if it had a lever for adjusting the teeth?

A. If it had a lever attachment for adjusting the teeth it would be a lever harrow.

Q. Suppose a lever were attached to a harrow for the purpose of adjusting the cross-bars which held the teeth, but they were adjusted by the lever one bar at a time, would it then be a float spring tooth harrow?

A. No.

Recross:

Q. Suppose the word "float" was applied to a spring tooth harrow because the frame bars and the teeth together ran along on the surface of the soil when the harrow was in use, would it in

439 your opinion make any difference with that classification, if applied for the reason stated, whether the teeth ran a quarter of an inch or four inches into the ground?

A. I can't see that it would.

Q. Now assume that the word float, as applied to a spring tooth harrow, was applied to it as indicating that the frame bars of the

harrow ran on the surface of the ground when the harrow was in use, would it in your opinion make any difference whether the teeth were all adjusted at one time or whether they were independently adjustable or whether bolted rigidly in classifying the harrow as a float harrow?

Objected to as incompetent, immaterial, irrelevant, assuming the facts not proved in the case.

Overruled, exception.

A. It would not.

Q. Practically farmers do not transport the *their* spring tooth harrows turned bottom side upwards and drawn on the bows of the teeth, to any very great extent, do they?

A. I think they do a good deal with float harrows.

Q. The drawing of the bows of the teeth on the soil would create friction would it not?

A. Certainly.

Q. If the soil was dry that friction would produce heat, would it not?

A. I presume it would a little.

Q. What does heat do to a tempered tooth? Does it improve the tooth or otherwise?

A. That depends on what degree of heat you give it.

WALTON A. NEWTON.

Subscribed and sworn to before me, this the 25th day of January 1895.

W. A. MATTESON,
Commissioner.

440 ARTHUR O. BEMENT recalled for cross-examination:

Q. Have you now before you a tabulated statement of all the harrows employing curved teeth which your house has shipped out since Sept. 10, 1890, compiled from your books?

A. I have and they are as follows:

From Sept. 10, 1890, to Jan. 1, 1891, Steel Kings, 195.
From Jan. 1, 1891, to Jan. 1, 1892, Steel Kings, 5,645.
From Jan. 1, 1892, to Jan. 1, 1893, Steel Kings, 4,409.
From Jan. 1, 1893, to Jan. 1, 1894, Steel Kings, 1,194.
From 1894 to 1895, 391 Steel Kings.
Totals, 11,834.
Clippers from Sept. 10, 1890, to Jan. 1, 1891, 40.
Clippers from Jan. 1, '91, to Jan. 1, '92, 1,452.
From Jan. 1, '92, to Jan. 1, '93, Clippers, 654.
From Jan. 1. '93, to Jan. 1, '94, Clippers, 375.
From Jan. 1, '94, to Jan. 1, '95, Clippers, 505.
Totals, 3,026.
Reliance harrows from Sept. 10, 1890, to Jan. 1, '91, 6.
No more Reliance.
Ajax lever harrows shipped from Jan. 1, '91, to Jan. 1, '92, 5.
Ajax harrows shipped from Jan. 1, '93, to Jan. 1, '94, 1,488.

Ajax harrows shipped from Jan. 1, '94, to Jan. 1, '95, 1,356.
Totals, 2,849.
Lansing harrows from Sept. 10, '90, to Jan. 1, '91, 14.
Lansing harrows from Jan. 1, '91, to Jan. 1, '92, 93.
Lansing harrows from Jan. 1, '92, to Jan. 1, '93, 93.
From Jan. 1, '93, to Jan. 1, '94, Lansing harrows, 63.
441 Lansing harrows from Jan. 1, '94, to Jan. 1, '95, 119.
Total, 382.

Total sales of all kinds of harrows from Sept. 10, 1890, to Jan. 1, 1895, 18,097.

Defendant's counsel objects to the evidence last given by Mr. Bement, as incompetent, immaterial, irrelevant, not cross-examination, and reopening the plaintiff's case and moves to strike it out commencing immediately following the question on page 440, "Have you now before you a tabulated statement," etc.

Overruled and motion denied. Exception.

Q. From 1890 to the following Sept. 10 up to 1895, did your company sell spring tooth harrows to Geo. H. Tyler of Boston?

Objected to as incompetent, immaterial, irrelevant, not cross-examination and reopening the plaintiff's case.

Overruled. Exception.

A. No. We never sold Geo. H. Tyler anything.

Q. Well, Geo. H. Tyler & Co. anything?

A. No, never sold Geo. H. Tyler & Co. anything.

Q. Have you sold harrows employing curved spring teeth to any party in Boston, and if so what is his name?

Same objection as last stated above.

Overruled. Exception.

A. We have sold Geo. Tyler & Co. harrows.

Q. In what years?

Same objection.

Overruled. Exception.

A. I think since 1889.

Q. Have all of the harrows which you have sold Geo. Tyler & Co. of Boston, been sold or settled for at less prices and on
442 more favorable terms of settlement than the schedule of prices attached to the licenses in suit?

Same objection.

A. Yes, sir, they have.

Overruled. Exception.

Q. How many hundred harrows approximately, have you sold Geo. Tyler & Co. of Boston, which have been settled for on more favorable terms than those specified in the license contract in suit?

A. I am not able to state.

Q. Have you the means of giving the number of harrows that

have been sold to Geo. Tyler & Co., since Sept. 10, 1890 and the prices at which they have been settled for?

Same objection.
Overruled. Exception.

A. I don't know whether we could dig it out or not. Think we could though.

Q. Will you furnish to be attached to this deposition, the number of harrows, the styles of harrows and the prices at which you settled with Tyler, for the harrows furnished within the period before mentioned?

A. I don't think I would. I think it would be altogether too much of a job.

Q. Will you furnish the number of harrows sold by your company to Geo. Tyler & Co., from Sept. 10, 1890 to Jan. 1, 1895, compl*i*ed from your books, and have same made a part of your deposition?

A. No.

Q. Can you obtain that information from your books?

A. I think I could with a good deal of labor. Would not want to be sure about it though.

Redirect:

443 Q. Had you a contract with the National Harrow Co., which allowed you to sell to Geo. Tyler & Co., harrows at less than the prices fixed by the National Harrow Co.?

A. We did have an agreement.

Q. And that was because you had an agreement with Geo. Tyler & Co., to furnish them harrows at certain prices before you went into the National Harrow Co.

A. Yes.

Q. Was that contract in writing?

A. It was not.

Q. Did your company ever report to the National Harrow Co., under any license contract, the sale of the Lansing spring tooth harrows or ever pay any royalty on them to the National Harrow Co.

A. We never reported that harrow nor paid any royalty on it, as it was agreed at the time we went into the company that it was not a float spring tooth harrow.

Recross:

Q. Was the contract to which you refer as having made with the National Harrow Co., for the sale of the harrows to Tyler & Co., made at Buffalo in Oct. 1890, when you went into the company?

A. It was. The agreement was made when we went into the company as otherwise we should not have gone in, as we had an agreement with Tyler & Co.

A. O. BEMENT.

Subscribed and sworn to before me this the 25th day of January, 1895.

W. A. MATTESON,
Commissioner.

Adjourned for one hour.

CHARLES S. EMERY, witness for defendant, being duly sworn testified as follows:

444 Q. What is your residence, age, occupation, and how long have you been engaged in the business in which you are now?

A. Lansing, Mich., 38 years old; I have been for the last seven years in the employ of E. Bement & Sons, first, in superintendent's or manufacturing department office, and for the last three years in the order and shipping department.

Q. During that time have you been familiar with the trade in spring tooth harrows?

A. I have.

Q. Do you know what is considered in the trade a float spring tooth harrow?

A. I do.

Q. Please describe it.

A. A float spring tooth harrow is one that has a separate adjustment for each tooth, and has a rigid frame for one thing, it is not carried on wheels; the depth of the teeth in the ground is regulated by changing the position of all the teeth, each independent of the others.

Q. Has it any characteristic peculiar to it in regard to its being transported from place to place through the fields? If so, what?

A. The usual method of transporting a float spring tooth harrow from place to place is to turn it over and drag it on the bows of the teeth.

Q. Do you know the harrow manufactured by defendant, and called the lever Ajax harrow?

A. Yes, sir.

Q. How is such a harrow as that designated in the trade?

A. As a lever spring tooth harrow, or adjustable harrow.

Q. Is that harrow a float spring tooth harrow?

A. No sir.

445 Q. Are any lever harrows known to the trade as float spring tooth harrows?

Objected to as incompetent.

A. I don't know of any such.

Q. When did you first see or hear of a lever harrow being on the market? I mean a lever spring tooth harrow.

A. I should think it was about two years ago.

Cross-examined by Mr. RISLEY:

Q. There were lever harrows, were there not, on the market when you first became acquainted with agricultural tools?

A. I think not.

Q. How many years ago was it when you first saw the lever spike tooth harrow?

A. Fifteen years at least.

Q. When was it that you first saw levers on wheel harrows?

A. Twenty-five years ago, possibly.

Q. Well then a lever as applied to tools classified as harrows is at least 25 years old to your knowledge?

A. Yes, sir.

Q. How many hundred different styles of wheel harrows where a lever was used have you seen in your day?

A. Probably not many hundreds but a great many certainly.

Q. Suppose the wheel harrow had the levers left off, so that when the harrow was transported the teeth would run in the ground. Would that be a wheel harrow still?

A. To all appearances it would.

Q. Would it in fact as well as in appearance be a wheel harrow?

A. I think it would be something else.

446 Q. Are all wheel harrows which are transported and operated by means of wheels running on the ground, and the harrow teeth and frame bars to which the teeth are attached supported upon or carried by some attachment connected with the axletree of the harrow, of all classes of construction denominated in the trade, wheel harrows?

A. I do not recall any that are not.

Q. Then, would you say that any lever or other means of adjusting the tooth bars and the teeth, would have anything whatever to do with determining the question of whether the structure was a wheel harrow?

A. I should think not.

Q. The harrow which you designate as a float; does the word "float" indicate to your mind a classification of harrows which would distinguish it from a wheel harrow?

A. Yes, sir.

Q. Take the float harrow as you have before described, does it have frame bars?

A. Yes, sir.

Q. Do the frame bars when the harrow is in operation, as harrows are ordinarily used, in harrowing plowed land, run in contact more or less with the surface of the plowed land?

A. The frame might touch some in places, but would not ordinarily.

Q. About what distance are the points of the teeth set below the frame bars in a float harrow?

A. Six inches.

Q. So that the harrow frame is supported above the ground on the points of the teeth. Is that right?

A. It is unless the ground is so soft that the draft pulls the teeth into the ground until the frame touches the ground.

Q. Suppose you have a soft field to harrow with a float harrow; what regulates the distance which the teeth go into the ground on a float harrow?

447 A. If the ground is soft enough it will stop when it gets down to the frame.

Q. Take the ordinary float harrow, it has a frame which at some time when the harrow is in operation in soft soil, runs on the surface of the ground. Is that right?

A. If the ground is soft enough, yes.

Q. The float harrow which you have described has curved teeth curving from the butt to the point, have they not?

A. Yes, sir.

Q. The butt of the tooth is fastened to the frame either adjustably or by rigid attachment, are they not?

A. I never saw any that were not adjustable.

Q. Is there any trouble in bolting the tooth solid to the frame?

A. No, there would be no trouble about doing so if you want to build a harrow that way.

Q. Don't you know as a matter of fact that there have been thousands of harrows denominated float harrows manufactured and sold and used where the curved teeth have been bolted through the tooth to the frame in a rigid manner?

A. I do not.

Q. Now, suppose that from 1877 for ten years after that date, thousands of harrows with teeth bolted to the frame as I have described, were sold on the market as float harrows, would you say that that designation was an improper one?

A. I should.

Q. Now as an expert, will you please classify that harrow; that class of harrows, I mean, as an agricultural tool in your own language?

A. It would be a spring tooth harrow. That would be as far as I could go in the classification.

448 Q. Now, won't you tell me what on earth has the adjustability of the teeth on a harrow of the character which you have described to do with designating the harrow as a float?

A. It has nothing to do with it.

Q. Then why did you put in your designation of a float harrow, a harrow that had teeth adjustable?

A. Because that is the common acceptation of the definition.

Q. Suppose a spring tooth harrow was made of the character which I have described, where the teeth were bolted rigidly to the frame, and such a harrow was transported on a stone-boat, would you say that you would class that as a float harrow floated on a stone-boat?

A. That would not make a floating harrow of it.

Q. Then it would be your opinion that the stone-boat would not determine the character of the harrow?

A. Certainly not.

Q. *In* classifying harrows, as floats, in your mind, have anything to do with the way the teeth are adjusted on the frame?

A. Yes, sir.

Q. Is the term "float" in your mind determined by the way the teeth are adjusted in the harrow?

A. No, sir; not by the way.

Q. Does the frame bars of a lever harrow run along more or less on the plowed surface of the land when the harrow is used?

A. The same as in the float harrow about. Depending on the character of the soil and the depth of the adjustment of the teeth.

Q. Then the float harrow and the lever harrow have in common about the same amount of contact with the ground under the same conditions?

A. Yes, sir.

449 Q. Suppose the word "float" as applied to spring tooth harrows, was applied to them on account of the fact that the frame bars ran along more or less on the surface of the ground. Would that in your mind, make a lever harrow a float harrow?

Objected to as incompetent, immaterial, irrelevant.

Overruled. Exception.

A. Under those circumstances I think it might be classed as a float harrow.

Q. Do you think it reasonable to suppose that the word "float" was applied to spring tooth harrows because they could be transported bottom side up on the bows of the teeth?

Same objection as stated above.

Overruled. Exception.

A. Not that alone.

Q. Does the word "float" as applied to a harrow, apply to a class of harrows or to the functions and operation of the harrow when used?

A. It applies to a class.

Q. Are there a great many types of a class of harrows known as wheel harrows?

A. Yes, sir.

Q. Are there also a great variety of types of a class of harrows designated floats?

A. Yes, sir.

Q. Is one of the types of that classification a lever?

A. No.

Q. Is the office of a lever that of an attachment applied to a spring tooth harrow in order to provide means for simultaneously adjusting all of the teeth in each section of the harrow?

A. That is one of its principal uses.

Q. Is there any other than that of adjusting the teeth simultaneously and holding them when adjusted?

A. Yes.

Q. What is it?

450 A. One would be to relieve all the teeth from the ground entirely.

Q. Is not that all involved in the abiiity to adjust the teeth up or down, and hold them adjusted?

A. Yes, sir.

Q. Then, in point of fact is not the lever appliances an attachment to a spring tooth harrow?

A. No, it is an entirely different method.

Q. Do you mean by that that the lever and its connecting mechanism is not attached to the harrow frame?

A. Certainly not.

Q. In point of fact it is attached to and forms a part of the harrow frame?

A. Yes, sir.

Q. Now I repeat the question, is not the lever and its attachments something applied to the harrow frame?

A. Yes, sir.

Q. And its sole purpose is to elevate or depress the working points of the teeth and hold them in the position to which they may be adjusted?

A. It is.

Q. Do you mean to be understood in view of your evidence given here, that the mere attaching of a lever and its connecting mechanism to the frame so as to operate the teeth of the harrow in their adjustment, changes the classification of the harrow, from a float to something else?

A. Yes, sir, I do.

Q. So far as the operation of the harrow is concerned, does it make a particle of difference whether each tooth on the frame could be independently adjusted and held in the position to which it was adjusted, whether it was done by independent adjustment or the simultaneous adjustment?

A. You would get the same work from the harrow in either case.

451 Q. Then the question as to whether they were independently adjustable or simultaneously adjustable, is of no importance in affecting the practical operation of the harrow?

A. No, sir, I should think not.

Q. Please define your understanding of the word "harrow."

A. A harrow is a tool which prepares plowed ground to receive the seed or covers the seed after it is sowed.

Q. The word "harrow" would then include the various classifications known in the trade as a wheel harrow, a spike tooth harrow, a smoothing harrow, a spring tooth harrow, disc harrow, and *and* a spading harrow?

A. Yes, sir.

Q. The general classification- which I have mentioned are the general classifications that are universally known in the trade are they not?

A. Those are the broadest classifications.

Q. What would you understand broadly, by spring tooth as applied to harrows?

A. A tooth made of spring steel.

Q. And it would be your idea that the tooth would be made so that it would be more or less flexible?

A. Yes.

Redirect:

Q. Is a lever harrow a completed harrow until the lever and the parts which go with the lever are placed upon it.

A. No sir.

Q. In answer to a question put to you by plaintiff's counsel, viz. "Then the question as to whether they were independently adjustable, or simultaneously adjustable, is of no importance in affecting the practical operation of the harrow." To which you answered, "No sir, I should think not." Did you take into consideration in giving that answer, the fact that a lever harrow when in operation, all the teeth are adjusted at one time.

452

A. I wish to be understood to mean that it makes no difference as to the work obtained from the harrow.

CHAS. S. EMERY.

Subscribed and sworn to, before me, this the 25th day of January, 1895.

W. A. MATTESON,
Commissioner.

HENRY S. BARTHOLOMEW, a witness for defendant, being duly sworn, testified as follows:

Q. Where do you reside, what is your age and occupation and how long have you been engaged in the business you are now in?

A. Lansing, Mich., 29 years old, work for E. Bement & Sons as credit clerk, have been in their employ six years.

Q. Are you familiar with the trade in spring tooth harrows?

A. Yes sir.

Q. Mr. Bartholomew what do you designate the parts of harrows in the trade?

Objected to on the ground that it is incompetent and immaterial.

A. Extras, attachments or repairs.

Q. Are these parts sent out for the implements to dealers?

A. Yes sir.

Q. What is the object of sending out these extras or attachments to the dealers?

A. They are sent for many reasons. Ordinarily to made good, harrows that are worn or broken or defective.

Q. Do you sometimes sell or do you not sell, frames without the attachments?

A. Yes sir.

453 Q. For what purpose are frames sold without the attachments?

A. Use them with teeth which they obtain elsewhere.

Q. Does the frame of itself include clips, and bolts for holding clips? And other as La Dow would say "toggling"?

A. Yes sir, ordinarily.

Q. Specify the parts which you call extras, attachments or repairs?

Objected to as utterly immaterial.

A. Teeth, clips, evener, draw-rods, clevises, bolts, nuts and washers.

Cross-examined by Mr. RISLEY:

Q. Are you connected as an officer with the North-Molitor Company?

A. Yes, sir.

Q. Please state in your own language, exactly the relation which the North-Molitor Company sustains to E. Bement & Sons.

Objected to as incompetent, immaterial and irrelevant.

Overruled. Exception.

A. There is a contract between them which specifies that E. Bement & Sons are to sell them certain goods at certain prices, and which specifies the terms of payment and details of the sale.

Q. Was not a part of the purposes of organizing the North-Molitor Company, to aid in marketing and extending the market of lines of goods manufactured by E. Bement & Sons?

Objected to as incompetent, immaterial, irrelevant and not the best evidence.

Overruled. Exception.

454 A. That may have been an ulterior motive of E. Bement & Sons.

Q. Does the North-Molitor Company issue and circulate a catalogue in which there is illustrated a line of goods which bear the name of the North-Molitor Manufacturing Company which are identical in construction with lines of goods advertised and sold under the name of E. Bement & Sons?

A. Yes.

Q. Have the North-Molitor Company marketed and advertised wood frame harrows of the same construction as the Clipper wood frame harrow manufactured and marketed by E. Bement & Sons?

Objected to as incompetent, immaterial and irrelevant. Same objection to the next previous question.

Overruled. Exception.

A. Yes.

Q. Are those harrows manufactured by E. Bement & Sons for you under your contract with them?

A. Yes, sir.

Q. About how many wood frame harrows, like the Clipper, have you procured to be manufactured by E. Bement & Sons, for the North-Molitor Company?

Objected to as incompetent, immaterial, irrelevant and reopening the plaintiff's case.
Overruled. Exception.

A. Very few, I do not know even approximately.
Q. Has the North-Molitor Company sold wood harrow frames made of wood, without teeth?
A. I don't know.
Q. Has E. Bement & Sons sold harrow frames either wood or steel, without teeth, so far as you know?
A. Yes.
Q. To what extent?
A. Limited extent.

H. S. BARTHOLOMEW.

455 Subscribed and sworn to before me, this the 25th day of January, 1895.

W. A. MATTESON,
Commissioner.

Mr. ARTHUR O. BEMENT, recalled, by defendant'- counsel.

Q. Why was it that the North-Molitor Company was organized?
A. It was organized to build a harrow invented by Ford North and which he was negotiating to sell out to a competitor.
Q. What was the harrow called?
A. The Black Diamond.
Q. Was he in your employ when he invented the harrow or in any way connected with the defendant?
A. He was not.
Q. And after the organization of the company, it took a license to sell the Black Diamond from the National Harrow Company, did it not?
A. It did.
Q. What are the terms used to designate the component parts of a float spring tooth harrow?

Objected to as immaterial, incompetent.
Overruled. Exception.

A. Repairs, attachments, extras.
Q. Now, state what they are made up?
A. The teeth, bolts and clips, clevises, eveners, chains, fenders.

Cross-questions:

Q. What would you designate the tooth?
A. I should designate it an extra, or an attachment, or a repair, for a harrow.
Q. What would you call the lever connecting bar?

A. There is no lever connecting bar to a float spring tooth harrow and could not be one.

456 Q. Suppose a party broke his lever and ordered another one from you, what would you call that?

A. It would be an attachment for a lever spring tooth harrow.

Q. Suppose he broke one of the cross-bars and wanted to order another, what would you call that?

A. I should call that a repair or extra for the frame.

Q. Do you think that it was honest and fair for your officers to organize a corporation to build a harrow when you had agreed that you would not manufacture or be interested in the manufacture and sale of any other float spring tooth harrow than the one licensed? And then apply to the National Harrow Company and as a member of the executive committee vote, to grant yourself privileges which were not granted to any other licensee, without making known to the members of the executive committee that your company wa the organizer and the operator of the North-Molitor Company?

Objected to as incompetent, immaterial, irrelevant and improper, assuming facts not proved.

Overruled. Exception.

A. As the premises set up are not true nor according to fact, I am not able to answer the question.

Q. Assuming the facts to be as set up in the question, would you say that such a transaction was honest?

Same objection.

Overruled. Exception.

A. It would not be according to my code.

A. O. BEMENT.

The objections made to the evidence taken on the commission were renewed when the depositions were read and the referee ruled on them and exceptions were taken as now appear in the case.

[Matter enclosed between rules printed on a slip facing page 456.]

Subscribed and sworn to before me this the 25th day of January, 1895.

W. A. MATTESON,
Commissioner.

457 Ex. 100. W. A. M.

Contract.

Whereas the undersigned are each engaged in the manufacture and sale of float spring tooth harrows, under various letters patent of the United States, and it is deemed desirable, and for the mutual advantage of all engaged in the float spring tooth harrow business that a corporation be formed under the laws of the State of New

York, known as the National Harrow Company, to which corporation the various United States patents and good will of the business of those engaged in the float spring tooth harrow business shall be transferred, and that each person, firm or corporation who enters into this agreement shall receive the appointment of agent and licensee of the corporation, to manufacture and sell under specified conditions, float spring tooth harrows, the good will of which business shall be transferred to the corporation, upon uniform terms and subject to uniform conditions applicable alike to all, except in the particular style of harrow which each shall be licensed to manufacture and market, and, to accomplish this result, and in consideration of one dollar, each *of* the other paid, and of the mutual advantages and benefits to be derived therefrom, each with the other, and each with the National Harrow Company when organized, agrees as follows:

First. Each person, firm or corporation who sign this agreement, agree to forthwith organize a corporation under the laws of the State of New York, to be known as the National Harrow Company, with a capital of five hundred thousand dollars ($500,000) to be divided into five thousand shares (5,000) of one hundred dollars each (100), with thirteen (13) trustees, one to be selected and continued in office from each of the first thirteen persons, firms or corporations,
458 who subscribe to this agreement. It being desirable to now organize the corporation and designate the thirteen trustees, the individuals designated as trustees agree to resign from time to time as other names are added, so that the first thirteen individuals, firms or corporations who transfer the patents and good will of their business shall each be entitled to one trustee, to be designated by such separate interest, and the other person or persons connected with said interest shall resign as trustee, and to determine the order in which the trustees not designated to remain shall resign, shall be determined from time to time by lot, and the right of separate interest to hereafter designate one trustee shall continue so long as the particular interest which the trustee is selected to represent, conform and comply with the requirements of their contracts, with the corporation, and a designation of the person who is to represent the particular interest, shall be made in writing and filed with the treasurer of the company, and such designation shall be respected, and the individual designated shall be continued as a trustee.

Second. Each person, firm or corporation who sign this contract shall upon request, execute and deliver a formal assignment of any and all United States patents for record, which they then own, or which they may thereafter acquire, relating to float spring tooth harrows, to the corporation, and shall execute an assignment of the good will of their business in float spring tooth harrows to the corporation, and agree not to be thereafter interested in the manufacture or sale of float spring tooth harrows, except as agents and licensees of the National Harrow Co., and accompany the transfer with a bond, with sureties to be approved, for the faithful performance of the contract.

Third. The National Harrow Co., shall issue to each person, firm

or corporation who transfer the good will of their business
459 and patents to the corporation, written authority to act as its agents and licensees, to manufacture and sell upon their own account and credit and in their own name, float spring tooth harrows, which agency and license shall be uniform as to terms and conditions with all agents and licensees, except as to the particular styles of harrows authorized to be manufactured. The agents and licensee shall account for and pay to the corporation one dollar on each and every float spring tooth harrow manufactured and sold, payable at uniform times, with all other agents and licensees of the corporation. The transfer is made upon — condition that the corporation shall not license any person, firm or corporation to manufacture a style of harrow licensed to another unless the licensees were immediately preceding this agreement, manufacturing the same style of harrow. (The licensees above specified shall be exclusive, and the corporation shall not manufacture and sell any style of harrow, which they have licensed their agents to manufacture and sell.) And the corporation shall issue licenses under the foregoing provision, to the person, firm, or corporation who assign their patents and good will of their business, uniform licenses to manufacture the same styles of harrows, subject to uniform conditions which they were manufacturing and selling just prior to the agreement, and to such of the other agents and licensees as are manufacturing only one style of harrow, they may under uniform conditions, license such persons, firms or corporations to manufacture one type of wood-framed unlined harrows, but not the peculiar features of clip or fastening licensed to another. "Provided always that no person, firm or corporation shall be licensed to sell nor offer for sale, an unlined wood frame harrow to be used in the territory of the New England States—New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and West Virginia."

Fourth. In case of any differences existing between the
460 corporation, and the persons, firms or corporations who have signed this agreement, and any other person, firm or corporation who may desire to come into this arrangement and become parties hereto, all such differences shall be adjusted by arbitration, the corporation and the interests which have already taken the benefits of this contract shall unite in selecting one arbitrator, and the particular interests in reference to which the differences exist shall select one arbitrator, and the two shall hear the proofs and allegations of the respective parties and shall then decide the same; and in case they cannot agree, then they shall select a disinterested person to act as umpire, and the decision of any two shall be final, touching the question in controversy, on all interests, and shall be carried into effect.

Fifth. In case it shall, at any time be deemed to the mutual advantage of the interests represented, to dissolve this corporation, and terminate all contracts and licenses, and nine directors of the corporation so vote by resolution, then and in that event, the corporation shall cancel all existing licenses and contracts, and shall execute and deliver to each person, firm or corporation a transfer of all

of the interests which said person, firm or corporation transferred to the National Harrow Company, and release such interests from all further obligation under any existing contract or license the intent being to vest in each person, firm or corporation who becomes party hereto, all interests which they transferred to the National Harrow Company, and each stockholder shall surrender their stock to the corporation, execute and deliver a release of all claims, and any sum of money that may remain after the payment of the debts of the National Harrow Company shall be divided to the stockholders, according to the amount of stock which each interest holds, *pro rata*, and the corporation shall thereupon be wound up and
461 its business discontinued, and no acknowledgment of the validity of any patent shall be of any force or effect thereafter, but each interest shall stand upon the same ground, with reference to their respective interests, as they did prior to the execution of this contract.

Sixth. Each person, firm or corporation who transfer the good will of their float spring tooth harrow business and patents thereto, to the National Harrow Company, shall receive in payment therefor, the value of the same, as agreed upon or fixed by arbitration, in paid-up stock of the corporation.

This shall be deemed a continuing contract, and shall apply to, and bind the parties, their heirs, successors or assigns.

Witness our hands and seals this — day of July, 1890.

—— ——.

In presence of,

—— ——.

Ex. 101. W. A. M.

Philo S. Curtis, pres't. Edward Norris, sec'y and treas.

Eureka Mower Company.

UTICA, N. Y., *Oct.* 30, 1890.

E. Bement & Sons, Lansing, Mich.

DEAR SIR: Replying to your favors of the 24th and 28th instant, will say that I have thought it my duty to write fully to Reed & Co., giving them the extract quoted in your letter from your traveling man. I have also stated to him that it was understood that when you and some of the rest came into the company that you should fill such contracts, as were outstanding for the number of harrows stated therein, and we decline to furnish any harrows thereafter for less than combination rates. By resolution of the board you and the rest are to state in your first monthly report of harrows sold
462 the number that had been shipped for less price. And also to deposit with the treasurer a copy of your continuing contract with Tyler & Co.

Yours truly, THE NATIONAL HARROW CO.
E. NORRIS, *Tr.*

Ex. 102. W. A. M.

E. Bement & Sons, received Nov. 20, 1890, ans. Nov. 21, 1890, Lansing, Mich.

UTICA, N. Y., *Nov. 15th*, 1890.

Messrs. E. Bement & Sons, Lansing, Mich.

GENTLEMEN: Three thousand circulars like enclosed have been sent you by express for the purpose of mailing to your customers and the trade. If you can use more to advantage, advise how many in addition you wish, and they will be forwarded promptly.

Truly yours, THE NATIONAL HARROW CO.

DEF'T'S EX. 103.

Office of the National Harrow Co.

UTICA, N. Y., *Jan.* 1, 1891.

To those interested in float spring tooth harrows:

The National Harrow Company has acquired by purchase the entire right to manufacture and market float spring tooth harrows, from all parties engaged in the manufacture and sale in the season of 1890.

The following parties are working under the agency and license contracts of the National Harrow Company:

D. C. & H. C. Reed & Co.,	Chas. H. Childs & Co.,
A. W. Stevens & Son,	Syracuse Chilled Plow Co.,
463 E. Bement & Sons,	Chase, Taylor & Co.,
W. S. Lawrence,	Eureka Mower Co.,
Hench & Dromgold,	Childs & Jones,
Geo. Sweet & Co.,	De Wayne B. Smith & Co.,
Farmers' Friend Mfg. Co.,	Herendeen Mfg. Co.,
Williams Mfg. Co.,	McSherry Mfg. Co.,
Walker Mfg. Co.,	L. C. Lull & Co.,
Clipper Chilled Plow Co.,	D. O. Everest & Co.

Our agents market a variety of styles of harrows, suited to all uses and conditions of soils throughout the country, at prices lower than standard harrows have heretofore been sold.

It is a gratifying fact to dealers and users of licensed harrows, to have placed at their disposal so large a variety of harrows all free from claims of infringement, and from patent law suits, which in the past have cost dealers and users thousands of dollars. Dealers and users can now rest in the confident assurance that in using licensed harrows — freed from all annoyances, and the users will be relieved from the necessity of hiding their harrows in order to escape liability for infringements, as the National Harrow Company now owns all of the principal patents, more than one hundred in number, which secure to it the complete right to manufacture all practical spring tooth harrows. See that our harrows bear the license label — this company.

The National Harrow Company. Incorporated.

License | Licensed By. | Label.

1890.
Utica, N. Y.

464 It will be appreciated by those interested in the harrow trade, that this company was formed in the interests of business harmony and protection for the dealers and users, and it is not its purpose to interfere with the just and lawful rights of any one, and it will not be expected to permit others to interfere with its just and lawful rights. The business interests centered in this company are large, representing immense toil and labor, and a vast expenditure of money, and it having, by virtue of patents owned by it, the complete right to manufacture every practical spring tooth harrow capable of being constructed, it will be its duty to protect its agents, and their customers to the fullest extent.

To enable the National Harrow Co., to protect those handling or using licensed harrows, against unlawful infringements, you will confer a favor on the trade and on this company, by giving immediate information of the sale or use of any unlicensed harrows in your neighborhood.

Test suits have already been commenced by this company on some of these patents, and other suits may be expected to follow, against those handling or using the "Buffalo Pitts" harrow, as we are advised that this harrow is an infringement on at least four valid patents now owned by the National Harrow Co. Suits have already been commenced against Griffith, Turner & Co., of Baltimore, Md., and C. F. Merrill, of Paris, Me.

It is the duty of this company to protect the business and trade of its agents, licensees and their customers, from infringements, and any party found selling or using an unlicensed harrow which is an infringement on any patent owned by this company, will be prosecuted to the extent of the law regardless of expense.

THE NATIONAL HARROW CO.

465 Ex. 105. W. A. M.

Nov. 29, 1890.

National Harrow Co., Chas. H. Childs, pres., Utica, N. Y.

GENTLEMEN: I note what you say with reference to having purchased of Mr. Lawrence the patent which Mr. Batchelor owned. I am not quite posted as to who it is that has the authority to do the business of the National Harrow Co. I had supposed that belonged to the directors of the company to pass upon all such matters as purchasing a patent. You can very readily see if we had been consulted in this matter there could have been saved $1,000 as to pay what was paid for it. I should like to have some light on this subject.

Yours truly,

E. BEMENT & SONS,
By A. O. BEMENT, *Pres.*

Ex. 104. W. A. M.

Incorporated 1890. Capital, $500,000.

The National Harrow Company, Utica, N. Y.

Chas. H. Childs, pres't; A. O. Bement, 1st vice-pres't; Le Roy W. Stevens, 2nd vice-pres't; Frank J. Henry, 3rd vice-pres't; Edward Norris, sec'y and treas.

Nov. 26, 1890.

Mr. A. O. Bement, Lansing, Mich.

DEAR SIR: I have just returned after an absence of several days and find your letters of 19th inst. and 21st inst.

Never heard of the Northwestern Harrow Company at
466 Kalamazoo, or the harrow, a cut of which you enclosed. Will forward the same at once to Mr. Henry of Kalamazoo, as he can probably look it up.

I wrote you on Nov. 5th regarding Mr. Tyler's prices on harrows. Now Mr. Tyler or any other person cannot be permitted to sell, quote prices, by letter or otherwise, or invoice harrows at any lower prices than 42 per cent. discount from the schedule or list prices made by the National Harrow Company, making the terms of payment Oct. 1st, or as much more favorable to himself as he chooses, and can then give a maximum discount of 10 per cent. for cash June 10th. If he is allowed to quote prices on any different basis it will certainly lead to misunderstanding and trouble.

I hope you will look after this.

It was decided by the National Harrow Company to make the price of the 14 and 16 tooth harrows the same. I am sorry if you did not so understand it, and hope you will change your list to correspond at once. Think I wrote you about this in answer to your inquiry some days ago.

I have called a meeting of the members of the executive committee here at Utica for Tuesday, Dec. 16th. This is a good long notice and I hope you can surely arrange to be here at that time. We must lay out a line of policy with reference to outside manufacturers, and also dispose of some other important matters.

I hope by that time the sample harrows will have arrived so that the licenses can be made out, and also hope that all of the assignments of the various patents of the licensees will have been received.

I return herewith letter of Francis M. Batchelor. The patent in question was bought by Mr. Lawrence of Kalamazoo, and is to be assigned to the National Harrow Company, the company to give notes for the same, $3,000, due next September for the payment of the same. The notes have already been sent to Mr. Henry
467 of Kalamazoo, to be turned over to Mr. Lawrence when the assignment is properly executed with a good straight title. I think this patent covers the construction of the Buffalo Pitts harrow, and we also have several other patents which they undoubtedly infringe.

We have already purchased a harrow of this make from a party in Maryland with a view of commencing suit as soon as we can carefully lay out the program.

I certainly hope nothing will prevent your coming here on Dec. 16th.

Truly yours, CHAS. H. CHILDS.

DEF'T's EX. 106. W. A. M.

DEC. 4, 1890.

Chas. H. Childs, pres., Utica, N. Y.

DEAR SIR: I find that some of our good friends in the harrow business are making agencies for harrows by allowing the parties with whom they make an agency a commission for selling the goods. In other words they take a large dealer and agree to give him so much for selling these goods to other dealers. This, it strikes me is a very plain evasion of our agreements. We think we are just as sharp as the other fellow in making contracts but we have thought that it was not policy for the association or any of its members to do business in this way. Please let me know what you think about it. If it is understood that we are doing business on that plan, we should like to be in but if it is your idea that such should not be done, we think it would be very much more desirable that it should be thoroughly understood by all the members of the association.

Very truly, E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

468 DEF'T's EX. 107. W. A. M.

The National Harrow Company heading.

DEC. 8, 1890.

Mr. A. O. Bement, Lansing, Mich.

DEAR SIR: I have just returned after an absence of several days and find yours of 29th ult., also yours 4th inst.

Some little time ago we could have purchased the Batchelor patent for $1,000, but it seems owing to negotiations by other parties the price was advanced. The patent was finally bought, as I understand it, in the name of a son of Mr. Lawrence of Kalamazoo. It seemed to be of great importance to have this patent in the hands of the National Harrow Company especially in view of suit against the harrow made by the Buffalo Pitts Co., Buffalo. I can see no reason in the world why Mr. Lawrence should not have turned this patent over to the company at the same price he paid, only that he choose not to do so.

A quantity of the circulars were sent to each of the licensee-, whom I suppose gave them thorough distribution among their respective customers. Do not see how it would be possible for the National Harrow Company or any central office to send out these circulars except they had all the names of the different licensees' customers, which would probably meet objection.

If you desire any more of the circulars notify and I will see that you get them.

Contracts for harrows whether sold on commission or otherwise must be taken in the name of the manufacturer, who of course is responsible for the prices and terms being maintained.

It seems to me to be important to commence suits against
469 the Buffalo Pitts harrow just as soon as possible. We have already in our possession some of these harrows purchased of customers already for suits to be commenced.

There are a good many important matters to be talked over and agreed upon at the meeting of the executive committee on the 16th inst., I certainly hope nothing will interfere with your being here at that time.

Truly yours, CHAS. H. CHILDS.

DEF'T'S EX. 108. W. A. M.

National Harrow Company heading.

DEC. 20, 1890.

E. Bement & Sons, Lansing, Mich.

GENTLEMEN: The writer spoke to you about an advance upon your royalty account to help us out with expenses. All of the original members have paid into the treasury $150 and as we are beginning a large number of suits, the expense upon which will necessarily have to be met at once, we ask you to kindly join the others, and send us your check which will be applied upon your royalty account.

Our funds are entirely exhausted.

Yours truly, THE NATIONAL HARROW CO.,
E. NORRIS, *Sec'y and Treas.*

W. A. M. EX. 109. W. A. M.

DEC. 22, 1890.

Chas. H. Childs, pres., Utica, N. Y.

DEAR SIR: We are just in receipt of a letter from our New
470 England agent saying that there is a harrow made up in Maine called the "Higgins" harrow that is being sold throughout the New England States for $12 apiece and 20 per cent. commission from that for selling, and that they have over 1,000 on hand and are placing them on the market. It is suggested by these parties that you probably have one of these harrows in stock as one was bought by a party by the name of Bartlett who worked for you last year and think you have it in stock. Please let us know in regard to it and if you do not have the harrow we think we can have one shipped without much delay.

Very truly, E. BEMENT & SONS,
By G. W. BEMENT,
Sec'y and Treas.

DEF'T'S EX. 110. W. A. M.

National Harrow Company heading.

DEC. 24, 1890.

Mr. A. O. Bement, Lansing, Mich.

DEAR SIR: I am this morning in receipt of letter from your firm with reference to Higgins harrows, which it is claimed are being sold in New England. You will remember at the meeting of the executive committee the other day this Higgins matter was talked over and I read a couple of letters which I had received from his attorney. This Higgins harrow was enjoined on the Childs patent something over a year ago. Higgins has several hundred harrows on hand, which of course under the injunction have been tied up. His attorney wrote that he proposed to make some change in the style of clip and market the harrows unless he could make some arrangement to do so by paying a royalty.

Mr. Higgins had invested several thousand dollars in manufacturing these harrows and wanted to get his money out in some way.

471 You remember it was decided by the executive committee to allow Mr. Higgins to sell the number of harrows he has on hand, confining his sales to the State of Maine, and pay a royalty of not less than $1.00 each to the National Harrow Co., and sell his harrows at regular schedule rates. We are now in negotiations with reference to this matter and hope to have it satisfactorily arranged within a few days. I had not heard before that Higgins was offering his harrows for sale at any price. Will follow the matter up.

Truly yours, CHAS. H. CHILDS.

DEF'T'S EX. 111. W. A. M.

FEB. 6, 1891.

National Harrow Co., Utica, N. Y.

GENTLEMEN: We have been creditably informed that Eddy & Sons of Greenwich, N. H., have placed a large order for the Buffalo Pitts harrows. Frank Miller of Johnstown, and Job Viall of Hoosick Falls, N. Y., have placed orders for B. P. harrows, also we think that East, Rising & Worden of the same place have bought the same harrows.

Yours truly,

E. BEMENT & SONS,
By A. O. BEMENT, *Pres.*
BART.

DEF'T'S EX. 112. W. A. M.

National Harrow Company heading.

JAN. 19, 1891.

E. Bement & Sons, Lansing, Mich.

GENTLEMEN: Replying to your favor of the 16th, will say

472 that we will put the information in regard to unlicensed har-

rows before our attorney. It may be possible that some of the persons named have already been gotten onto.

We do not receive report of harrows shipped in December. Blanks were sent you some time since.

Yours truly, THE NATIONAL HARROW CO.,
E. NORRIS, *Sec'y and Tr.*

DEF'T'S EX. 113. W. A. M.

National Harrow Company heading.

FEB. 20, 1891.

Mr. A. O. Bement, Lansing, Mich.

DEAR SIR: A meeting of the executive committee of the National Harrow Company will be held at Brozell house, Buffalo, N. Y., next week Wednesday, 25th inst.

The suit brought by the Clipper Chilled Plow Company, which we voted to defend, has been decided by the lower court against us.

It is important that we decide as promptly as possible upon the best action to be taken in the matter and I therefore hope you will surely arrange to be present at the meeting.

Truly yours, CHAS. H. CHILDS, *Pres't.*

DEF'T'S EX. 114. W. A. M.

FEB. 21, 1891.

Chas. H. Childs, Utica, N. Y.

DEAR SIR: I now know of nothing to prevent meeting you at Hotel Brozell, Buffalo, on Wednesday, Feb. 25, 1891.

Yours, A. O. BEMENT.

473 DEF'T'S EX. 115. W. A. M.

National Harrow Company heading.

MAR. 2, 1891.

E. Bement & Sons, Lansing, Mich.

GENTLEMEN: At a meeting of the executive committee of the National Harrow Company, held at Buffalo Feb. 26th, the following resolution was submitted and adopted:

"Resolved, That license labels that are ordered hereafter shall be accompanied by cash at the rate of 10 per cent. each instead of at 5 per cent. as heretofore ordered."

This resolution was brought about from the fact that the harrow company has had expenses to meet in litigating with the Clipper Chilled Plow Company of Elmira, N. Y., and royalties not being due until September, it was thought advisable to meet the expenses at once. We believe that all licensees will cheerfully comply with the action of the executive committee and when ordering labels hereafter comply with the resolution. You are doubtless advised that the litigation was settled by the Elmira people and the Pitts Agricul-

tural Works, Buffalo, N. Y., accepting a license from the National Harrow Co., and both firms will hereafter sell their goods at schedule prices and terms.

Enclosed please find report which please fill out for harrows shipped in February.

Yours truly, THE NATIONAL HARROW CO.
E. NORRIS, *Sec'y.*

DEF'T'S EX. 116. W. A. M.

National Harrow Company heading.

MAR. 14, 1891.

E. Bement & Sons, Lansing, Mich.

474 GENTLEMEN: Replying to your favor of the 11th, (with enclosure as stated) will say, we have sent 500 license labels by express this day.

Yours truly, THE NATIONAL HARROW CO.
E. NORRIS, *Sec. and Tr.*

A. O. B.:

We have just completed set of papers to take the place of former license and contract. Mr. Stewart has copies and left for Kalamazoo yesterday. It is our purpose to have you and the rest look them over and if satisfactory to us all, we will then present to the smaller concerns.

Yours, E. NORRIS.

DEF'T'S EX. 117. W. A. M.

APRIL 4, 1891.

Chas. H. Childs, Utica, N. Y.

DEAR SIR: We notice in looking over the price-list of harrow frames that there is no price on the frame less plates and we are having occasionally an inquiry for them and as there is a difference in the price of the complete harrow less frames, was it your intention we should make the same difference in the frames as we do in the completed harrow with and without linings? Please let us hear from you.

Very truly, E. BEMENT & SONS,
By G. W. BEMENT,
Sec'y and Tr.

DEF'T'S EX. 118. W. A. M.

National Harrow Company heading.

APRIL 6, 1891.

Messrs. E. Bement & Sons, Lansing, Mich.

475 GENTLEMEN: In reply to your esteemed favor 4th inst. as I understand it the parties interested thought best to ma*de*

the list prices of the different styles of harrow frames, that is, the steel frames, wood frames lined and wood frames unlined all the same and the licenses were arranged in this way.

Truly yours, CHAS. H. CHILDS.

DEF'T'S EX. 119. W. A. M.

National Harrow Company heading.

MAY 20, 1891.

A. O. Bement, Esq., Lansing, Mich.

DEAR SIR: There will be a meeting of the executive committee of the National Harrow Company at Utica, N. Y., on Wednesday 27th inst.

Matters of importance are to be considered and it is hoped that each member of the committee will be present.

Truly yours,

THE NATIONAL HARROW COMPANY.
CHAS. H. CHILDS, *Pres't.*

DEF'T'S EX. 120. W. A. M.

MAY 22, 1891.

Chas. H. Childs, president, Utica, N. Y.

DEAR SIR: The writer will be on hand at the meeting of the ex. com. the 27th inst.

Yours truly, A. O. BEMENT.

476 DEF'T'S EX. 121. W. A. M.

National Harrow Company heading.

JUNE 5, 1891.

Mr. A. O. Bement, Lansing, Mich.

DEAR SIR: Yours, 4th inst., at hand and I am very glad to say notices will be sent out today to all the licensees of the National Harrow Company, for a meeting to be held on the 16th inst. for the purpose of presenting to the arbitrators any claims with reference to the division of the stock. We will also send out notices to the trustees of the company for a meeting to be held at the same time.

All of the new contracts have been signed by the different parties here in the East, with the exception of the Herendeen Mfg. Co. of Geneva. I understand that this company have not made any harrows at all this season. Am also informed that upon the return of one of the members of the company, who has been absent for several days, that the papers will probably be signed and forwarded here.

We are expecting by every mail to receive all the papers signed by the Kalamazoo parties.

Truly yours, CHAS. H. CHILDS.

DEF'T'S EX. 122. W. A. M.

National Harrow Company heading.

JUNE 5, 1891.

A. O. Bement, Lansing, Mich.

A special meeting of the board of trustees of the National Harrow Co. will be held at Bogg's hotel in the city of Utica, N. Y.,
477 on June 16th, 1891, at 2 o'clock p. m.

THE NATIONAL HARROW CO.
CHAS. H. CHILDS, *Pres't.*
EDWARD NORRIS, *Sec'y and Tr.*

DEF'T'S EX. 123. W. A. M.

National Harrow Company heading.

JUNE 5, 1891.

E. Bement & Sons:

Take notice that the hearing before Messrs. Howard & Cookinham, arbitrators, will be brought on at Bogg's hotel in the city of Utica, N. Y., on the 16th day of June, 1891, at — o'clock p. m., and it is hereby requested that all persons interested in the distribution of the capital stock of the National Harrow Co. be present and prepared to present a statement of what is claimed by each respectively, in regard to the value of their rights to stock.

THE NATIONAL HARROW CO.
CHAS. H. CHILDS, *Pres't.*
EDWARD NORRIS, *Sec'y and Tr.*

DEF'T'S EX. 124. W. A. M.

National Harrow Co. heading.

JUNE 5, 1891.

A. O. Bement, Lansing, Mich.

DEAR SIR: I duly received your favor of the first with all papers enclosed. We are now well under way and have all papers either in hand or promised, excepting Herendeen Manufacturing Co. There is probably no doubt about their willingness to sign the papers but we have neglected them somewhat, owing to the fact
478 that they have not manufactured any harrows this year. The Syracuse people have been here today and are agreeable to the agreement.

Yours truly, THE NATIONAL HARROW CO.
E. NORRIS, *Sec'y and Treas.*

DE'FT'S EX. 125. W. A. M.

A. O. Bement, pres.; C. A. Gower, V. pres.; G. W. Bement, sec'y and treas.; C. E. Bement, supt.; A. S. Bement, ass't supt.

E. Bement & Sons, incorporated, manufacturers of agricultural implements, bob-sleds, heating and cook stoves.

LANSING, MICH., *Oct.* 24, 1890.

E. Norris, sec'y and treas., Utica, N. Y.

DEAR SIR: Replying to your favor of 22 inst. I am glad to know that the trade between Olin & Reed has gone on and the matter has been consummated. The checks we gave came in today and were promptly paid.

Yours truly,

E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

DEF'T'S EX. 126. W. A. M.

E. Bement & Sons heading.

LANSING, MICH., *Oct.* 22, 1890.

E. Norris, sec'y & treas., Utica, N. Y.

DEAR SIR: As yet I have not heard from you in regard
479 to the trade between Reed and Tuttle or whether you have found it necessary to use the checks. Please let me hear from you by return mail.

Very truly,

E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

PLAINTIFF'S EX. 126. W. A. M.

E. Bement & Sons heading.

Dictated.

LANSING, MICH., *Jan.* 25, 1892.

E. Norris, treas., Utica, N. Y.

DEAR SIR: The $1,800 note has already been forwarded to Mr. Brinkerhoff as per the terms of our settlement. I had called the Lansing national bank to task for not forwarding the $1,800 note for payment at the time of maturity and intended to make it interesting for them along that line on account of their neglect, but of course now that everything is settled up, we shall let the matter go without any further discussion with them on the subject.

Very truly,

E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

PLAINTIFF'S EX. 127.

$1,800. UTICA, N. Y., *Oct.* 10, 1890.

Sept. 15th, 1891, after date the National Harrow Co., promise
480 to pay to the order of E. Bement & Sons eighteen hundred dollars, at First National Bank of Utica. Value received with use.

THE NATIONAL HARROW CO.
E. NORRIS, *Tr.*

No. 7.
Due Sept. 15, 1891.
Paid.

Endorsed: E. Bement & Sons, by A. O. Bement, pres't, pay First nat. cashier, or order, for call, M. L. Coleman, cashier. No protest.

DEF'T'S EX. 127. W. A. M.

E. Bement & Sons heading.

LANSING, MICH., *Oct.* 27, 1890.

E. Norris, Utica, N. Y.

DEAR SIR: Replying to your favor of 24th inst. will say that we are glad to know the business of the National Harrow Company in connection with Olin & Co. has been closed up and the thing is all right. Also with reference to our Indiana business will say we know absolutely and positively there has been no cutting there in any way, shape or manner. Of course, as you know, we took some orders in Indiana before the combination was formed, but since going into it, no order has been taken from that territory or anywhere else at anything but combination prices and will not be. We expect to have Mr. Tyler here this week and we will investigate immediately with regard to any cutting of price in that territory, and if at any time you find or hear of any such thing, we shall esteem it a great favor if you will wire us because we do not propose to have it done in one solitary instance.

Yours truly,
E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

481 FEBRUARY 15TH, 1895.

WARREN M. BRINKERHOFF, a witness duly sworn, called for the defendant, testified as follows:

I was familiar with the harrow business in 1890. I knew the parties and was one of the parties that formed the National Harrow Company of New York. The parties agreed to form that company I think in the summer of 1890. The first meeting of directors was held at Buffalo in September, 1890. At that time the following manufacturers had consented to go into the National Harrow Company, as near as I can remember them. A. Stevens & Son, Charles

H. Childs & Co., D. C. & H. C. Reed & Co., Chase, Taylor & Company, Lawrence & Chapin, and G. B. Olin & Company. I saw some of the other manufacturers who finally joined the National Harrow Company, take part in the affairs of the National Harrow Company. It must have been before the arbitration. I can tell some that I saw take part in it. They were Eureka Mower Company, Farmers' Friend Manufacturing Company, D. O. Everest & Company, Childs & Jones, Williams Manufacturing Company, Herendeen Manufacturing Company, George Sweet & Company, Walker Manufacturing Company. * * *

The books of record will show who, in any way, assumed the management of the National Harrow Company.

I can only give from the records who took charge of the affairs of the National Harrow Company of New York, during the year 1890, as directors and officers. At the first meeting of the board of directors at the Broezel house in Buffalo, on the 9th of September, 1890, the following directors were present: Leroy W. Stevens, Warren M. Brinkerhoff, Hieber C. Reed, Moses Hill, Nehemiah Chase, Frank J. Henry, W. S. Lawrence, Charles Childs, Everet
482 Crumb. At an adjourned meeting held at two o'clock in the afternoon at the same place and on the date, Fred A. Taylor resigned, and David O. Everest was elected to fill the vacancy; Abram W. Stevens resigned, and Walker A. Dromgold was elected to fill the vacancy; Everet F. Crumb resigned, and James Manning of Syracuse was elected to fill the vacancy; Nehemiah N. Chase resigned, and Malcolm B. —— was elected in his place; Richard D. Tuttle resigned, and Edward Norris was elected in his place; Warren M. Brinkerhoff resigned, and Orlando J. Childs was elected in his place.

At the meeting of the directors on the 10th of September, 1890, at the same place, the following directors were present: Leroy W. Stevens, Hieber C. Reed, Moses Hill, Frank J. Henry, W. S. Lawrence, Charles H. Childs, W. H. Tuttle, Walker A. Dromgold, Edward Norris, James Manning, Malcolm B. Williams, D. O. Everest and Orlando J. Childs.

At the meeting of the board at the same place on the 11th of September, 1890, Moses Hill resigned, and upon motion of Orlando J. Childs Arthur O. Bement was elected trustee to fill the vacancy caused by the resignation of Moses Hill. Mr. Bement, however, was not present at the meeting.

At the meeting held at the same place, Buffalo, October 8, 1890, the following directors were present: Stevens, Reed, Henry, Lawrence, C. H. Childs, Manning, Williams, O. J. Childs, Norris and Bement; absent: Tuttle, Everest and Dromgold.

At this meeting the following vote was made: "Mr. Reed moved that A. O. Bement be elected to fill the vacancy. Carried."

Afterwards and on the 8th of October, W. H. Tuttle resigned and Albert Sweet was elected in his place, and on the same day
483 Walker M. Dromgold's resignation was tendered and Harrison Gilmore of Utica, was elected in his place.

Mr. Stevens moved that Mr. Harrison Gilmore of Utica, N. Y., be

elected trustee to represent the interest of Hench & Dromgold, seconded and carried.

I cannot remember a full meeting of the board after the 8th day of October, 1890, until the 6th day of June, 1891. The patents of the different parties were assigned to the National Harrow Company of New York. Some of the stock was issued A. W. Stevens & Son.

Conceded that at the date of the arbitration on the 17th day of June, 1891, that all of the interests which were the subject of arbitration in the way of patents and patented rights and licenses, patented privileges, which were the subject of arbitration had been assigned and the papers were in the possession of the company when the arbitration began, although some of the parties had not signed the arbitration agreements, but did sign them shortly after, and all of the parties took part and were represented in the arbitration.

After the arbitration and the award was made by the arbitrators, licenses were granted to the Pitts Agricultural Works of Buffalo, the Syracuse Chilled Plow Company, Gale Manufacturing Company, the Bucher, Gibbs Plow Company, Higgins & Company, Blake & Elliott of Racine, Wisconsin, and Osborne of Auburn, and Paul Blaker of Newtown, Pa. These several parties took licenses at different intervals between that date and the present time.

The last license to the Gale Company was granted a few days before this suit was brought, and that is the last one that has been granted. That all of the parties who had assigned their patents, patented rights, privileges under patents to the New York company, whose interests were considered by the arbitrators in awarding the stock, signed, executed and delivered papers identical with
484 Exhibits 1, 2, 3, 4 and 5, in all respects, except the particular styles of harrows which each of them were licensed by their respective licenses to build and manufacture, otherwise the papers were the same.

* * * * * * *

Witness continues.

Stock was to be given to the Syracuse Chilled Plow Company and the Pitts agricultural works for the patent rights, which they transferred to the National Harrow Company, but whether it was delivered I cannot say or how much.

Q. In some cases was stock issued to an individual where the licensee which he represented was a corporation, and if so in what cases, so far as you remember?

A. I don't know whether it was; it was to be issued and it was issued to Carlton Sprague; he represented the Pitts agricultural works. The plaintiff has no plant for the manufacture of any goods. It has no machinery for the manufacture of goods; nor tools for the manufacture of goods, nor did it ever have plant, machinery or tools for the manufacture of agricultural implements, to my knowledge. It has employed workmen in constructing harrows. It hired them as mechanics by the day, at Kalamazoo and Moravia. At Kalamazoo at various times; three or four different times. For

the first time I should say in 1892, to construct the Williams harrows. I don't know as to how many, about five hundred.

Q. Were those harrows, harrows that had been started by Williams or the Williams Manufacturing Company and the National Harrow Company bought him up and finished up the harrows which he had started?

A. It was uncompleted stock that formerly belonged to the Williams Company.

485 Q. And they finished them and closed them out?

A. They assembled the various parts together.

Q. And sold it?

A. I presume so.

Q. Did they stop business there?

A. They did.

Q. And when next did they do anything of that kind at Kalamazoo?

A. In connection I think with the Bostwick stock and also the Hunt stock. The dates I can't give without reference to the records. About the years 1892 and 1893. They were stocks that were handled in substantially the same way as the Williams. And Williams, Bostwick and Hunt went out of business so far as spring tooth harrows were concerned. We had a case of similar nature at Moravia; bought out the Walker Manufacturing Company; that must have been in 1892; we did just the same there, finished up harrows and put them on the market. And since then the plaintiff has not manufactured any goods or finished up any goods that I am aware of.

The plaintiff does not purchase material now for the manufacturing of harrows that I am aware of.

Q. Of what does the business of the plaintiff now consist?

A. Principally in protecting the licensees and enforcing the license contracts.

Q. Is there anything else that you can state?

A. Conducting a general business in connection with its licenses, purchasing patents if it is necessary.

Q. What else?

486 A. Making up and selling harrow stocks which it has on hand, and whatever is necessary in connection with its line of business.

Q. Is that all?

A. I believe it is.

Q. Now what stock is it making up now?

A. Moravia stock.

Q. Is it at work at it now?

A. Yes, sir.

Q. Where?

A. At the Standard Harrow Company.

Q. In what manner?

A. Finishing harrows.

Q. Does it do the work, or does it hire the Standard Harrow Company to do it?

A. It hires it done.
Q. It hires the Standard Harrow Company?
A. I can't say as to that.
Q. Does it employ any workmen to your knowledge now?
A. No, sir.
Q. And it has not employed any workmen since it did the work at Moravia and Kalamazoo, so far as you know?
A. No, sir.

Spring tooth harrows are sold in Pennsylvania, New York, Maine, Michigan, Maryland, and Wisconsin principally; some other States to a limited extent. These harrows are mostly used in the States I mentioned. In other States spike teeth and disc harrows are mostly used.

It was September 13, 1892, that the question of changing the then existing licenses to cover a lever harrow was considered by the executive committee.

It was brought before the executive committee by myself; the occasion being, D. B. Smith Company put a lever harrow out
487 on the market without a license and I told the executive committee that the licenses better be amended or altered so I could use them in cases of that kind, if necessary, without calling the board together; there was no further action taken on it. It was decided by a resolution passed, that the secretary make such disposition of the Smith Company's case, as to him may seem best; it was passed September 13, 1892. After that the executive committee had something to do with the lever license contracts. November 3, 1893, at which time the following resolution was passed: "Motion by Mr. Bement, seconded by Mr. Henry, that the change in the license be referred to Messrs. Stevens, Childs and Brinkerhoff with power to act. Carried unanimously." After the resolution was passed I formulated the lever license contract and sent it or took it to the licensees. I think I went in person to defendant with that license; cannot tell when.

Witness reads resolution passed in New York, September, 1892.

"Resolution by A. O. Dement:

Resolved, That the National Harrow Company license all of its licensees to build lever spring harrows on the following conditions:

1st. That there be added to the executive committee one member from the board of directors by a majority vote thereof to act with the executive committee for the purpose of passing upon harrows submitted to the committee for which a license is desired.

2d. That the party desiring a license, submit to the committee a full-sized working harrow as proposed to be built, and if it appears to the committee that the said harrow does not infringe upon the rights of other licenses of the National Harrow Company, then they shall be empowered to issue said license. The said committee shall require an approved bond from said licensee, guaranteeing to
488 hold the National Harrow Company safe from all harm on account of said license, and issue the said license subject to the conditions of said bond.

3d. The National Harrow Company shall have full charge and control of the defense of any and all suits brought against the licensees of the National Harrow Company arising from the granting of said licenses.

4th. The said committee shall meet on November 1st next, at Auburn, and pass upon any application then on file accompanied by a sample of a full-sized working harrow. In case any licensee is not ready to submit a sample of his proposed harrow at that meeting, then the committee will meet by request of said licensee, upon thirty days' notice or prior thereto at the call of the president to do so and pass upon said request. Any party obtaining a license to manufacture lever spring tooth harrows, shall assign to the National Harrow Company any and all patents, applications, licenses, or other rights they may hold, obtain or control, which have reference to harrows, coming within the scope of such licenses. Royalties on lever harrows to be the same as required to be paid under present licenses on other styles of harrows and payable at the same time and in the same manner.

Each licensee or applicant for a license shall produce with his application the file-wrapper contents of any patent, also abstract of title to such patent or patents which are to be assigned as per condition of this resolution, also copies of all drawings and specifications of pending cases."

In calling the meeting of the board of directors of the National Harrow Company, which call is dated October 1st, 1892, I used the expression "lever harrows," referring to the spring tooth harrows which had a lever attachment to them.

489 At the meeting of the board of directors, October 18, 1892, the following resolution was passed: "Motion by Mr. Reed, seconded by Mr. Bement, that the second clause of the second paragraph of the resolution of A. O. Bement requiring licensees of the National Harrow Company to give a bond be rescinded. Carried." In the minutes of the company's record, dated November 3, 1892, appears the following resolution: "Motion by Mr. Bement, seconded by Mr. Stevens, that a license be granted to the Eureka Mower Company on their butterfly-shaped lever harrow. Carried unanimously." I find a similar resolution in regard to other licensees with W. S. Lawrence, D. B. Smith Company, and Childs & Jones. I find upon the minutes of the company for November 3, a reference to a harrow manufactured by the Gale Manufacturing Company, and a statement purporting to be made by me. I find a reference to lever harrow licenses in the minutes of November 3, in a motion made by Mr. Bement, seconded by Mr. Stevens.

The resolution reads as follows: "Motion by Mr. Bement, seconded by Mr. Stevens that all licenses issued on lever harrows shall be issued as to the same date."

The attorney for the plaintiff in the D. B. Smith Company's suit was Daniel L. Hulburt of Auburn.

The defendant's attorney I think was Mr. Risley, I would not be certain.

"Cross-examination of WARREN M. BRINKERHOFF continued by Mr. RISLEY:

Q. Mr. Brinkerhoff, were all the harrows which the National Harrow Company voted to grant licenses to build, covered and embraced in the patents set forth in the contract in suit?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant, not cross-examination, reopening plaintiff's case and not the subject upon which a hypothetical question could be founded and the witness not competent to answer such questions as this, that the defendant has given no proof as to whether the patents embraced in the license contracts in form cover construction of harrows or not.

Objection sustained by the referee, and the evidence excluded upon the ground that the defendant had given no proof tending to show that the patents set forth in the contracts in suit did not cover the construction of the harrows licensed by the plaintiff.

The plaintiff excepted."

[Matter enclosed between rules printed on a slip facing page 489.]

Report of the arbitrators produced.

Mr. COOKINHAM: I offer it in evidence.

Report of arbitration received and marked "Def't's Ex. 135, S. E. J. Feb. 15, 1895," and is as follows:

490 In the Matter of the Distribution of Stock of THE NATIONAL HARROW COMPANY.

To the National Harrow Company:

The undersigned arbitrators, duly appointed to determine and fix the value of each and every patent and the rights thereunder, conveyed by the respective parties hereinafter named to the National Harrow Company, report as follows:

That they have been attended by the respective parties and some of them have appeared by counsel, and that the parties or their counsel submitted statements and arguments in regard to the distribution of stock; that they have duly considered all such statements and arguments, and have examined all the papers thus submitted. They also examined the patents submitted by every claimant and the drawings and claims thereunder, and they find the following facts:

1st. That D. C. & H. C. Reed & Co., were the owners of and have conveyed to "the National Harrow Co." the patents and interests in patents, and rights thereunder, as set forth in Schedule "A" hereunto attached, and made a part of this report.

2nd. That C. H. Childs & Co., were the owners of and have conveyed to "the National Harrow Company," the patents and interests in patents, and rights thereunder, as set forth in Schedule "B" hereunto attached and made a part of this report.

3rd. That A. W. Stevens & Co., were the owners of and have con-

veyed to "the National Harrow Company," the patents and interests in patents, and rights thereunder, as set forth in Schedule "C" hereunto attached and made a part of this report.

491 4th. That Taylor & Henry, were the owners of and have conveyed to "the National Harrow Company," the patents and interests in patents, and rights thereunder as set forth in Schedule "D" hereunto attached and made a part of this report.

5th. That W. S. Lawrence, was the owner of and has conveyed to "the National Harrow Company," the patents and interests in patents, and rights thereunder, as set forth in Schedule "E" hereunto attached and made a part of this report.

6th. That Eureka Mower Company, was the owner of and has conveyed to "the National Harrow Company," the patents and interests in patents and rights thereunder, as set forth in Schedule "F" hereunto attached and made a part of this report.

7th. That Hench & Dromgold, were the owners of and have conveyed to "the National Harrow Company," the patents and interests in patents and rights thereunder, as set forth in Schedule "G" hereunto attached and made a part of this report.

8th. That E. Bement & Sons, were the owners of and have conveyed to "the National Harrow Company" the patents and interests in patents and rights thereunder, as set forth in Schedule "H" hereunto attached and made a part of this report.

9th. That D. B. Smith & Co. were the owners of and have conveyed to "the National Harrow Company" the patents and interests in patents and rights thereunder, as set forth in Schedule "I" hereunto attached and made a part of this report.

10th. That the Farmers' Friend Manufacturing Co. was the owner of and has conveyed to "the National Harrow Company" the patents and the interests in patents and rights thereunder as set forth in Schedule "J" hereunto attached and made a part of this report.

492 11th. That George Sweet & Co. were the owners of and have conveyed to "the National Harrow Company" the patents and interests in patents and rights thereunder, as set forth in Schedule "K" hereunto attached and made a part of this report.

12th. That the Walker Manufacturing Co. was the owner of and has conveyed to "the National Harrow Company" the patents and interests in the patents and rights thereunder, as set forth in Schedule "L" hereunto attached and made a part of this report.

13th. That L. C. Lull & Co. were the owners of and have conveyed — "the National Harrow Company" the patents and interests in patents and rights thereunder, *and* set forth by Schedule "M" hereunto attached and made a part of this report.

14th. That the Herndeen Manufacturing Co. was the owner of and has conveyed to "the National Harrow Company" the patents and interests in patents and rights thereunder, as set forth in Schedule "N" hereunto attached and made a part of this report.

15th. That the Williams Manufacturing Co. was the owner of and has conveyed to "the National Harrow Company" the patents and

interests in patents and rights thereunder, as set forth in Schedule "O" hereunto attached and made a part of this report.

16th. That D. O. Everest & Co. were the owners of and have conveyed to "the National Harrow Company" the patents and interest in patents and rights thereunder, as set forth in Schedule "P" hereunto attached and made a part of this report.

17th. That Childs & Jones, were the owners of and have conveyed to "the National Harrow Company" the application for patents, and interests in patents and rights thereunder as set forth in Schedule "Q" hereunto attached and made a part of this report.

18th. That the McSherry Manufacturing Co. was the owner
493 of, and has conveyed, to "the National Harrow Company" the patents and interests in patents and rights thereunder as set forth in Schedule "R" hereunto attached and made a part of this report.

19th. That the patents and rights thereunder of G. B. Olin & Company which were assigned by that company to the National Harrow Company *was* worth $35,000.

20th. That many of the harrows manufactured by licensees who commenced manufacturing the particular style of harrow, made by them within the last few years, infringe many of the patents held by licensees, who preceeded them in business.

That the licensees who commenced the business of manufacturing harrows within the past few years, have procurred patents upon certain devices or combinations applicable to harrow-, but that many of such patents are of little value in comparison with the older patents which clearly anticipate the later ones; if not in every particular, yet they do anticipate them in regard to many of the essential elements employed.

21st. As further findings of fact and conclusions of law, they determine and fix the value of the patents and the rights thereunder conveyed by the respective licensees to the National Harrow Company as follows:

D. C. and H. C. Reed & Co.	$57,500
C. H. Childs & Co.	55,000
A. W. Stevens & Co.	50,000
Taylor & Henry	45,000
W. S. Lawrence	45,000
Eureka Mower Co.	33,800
Hench & Dromgold	32,000
E. Bement & Sons	29,200
D. B. Smith & Co.	12,500
The Farmers' Friend Mfg. Co.	10,300
George Sweet & Co.	10,100
The Walker Manufacturing Co.	9,900
494 L. C. Lull & Co.	9,800
The Herndeen Manufacturing Co.	5,100
The Williams Manufacturing Co.	5,100
D. O. Everest & Co.	5,100
Childs & Jones	5,100
The McSherry Manufacturing Co.	4,500

That the respective licensees above named are entitled to paid-up stock of the National Harrow Company in accordance with the value of the respective patents and rights as determined and fixed above. All of which is respectfully submitted.

WILLIAM G. HOWARD,
HENRY J. COOKINHAM,
Arbitrators.

SCHEDULE "A."

D. C. & H. C. Reed & Co.

Patent No. 388,306.
" " 413,538.
" " 396,944.
1–3 { Patent No. 266,348.
" " 241,528.
" " 284,278.
Patent No. 201,946.

Entire title in western territory, subject to the licenses of C. H. Childs & Co., A. W. Stevens & Co., Taylor & Henry, and W. S. Lawrence. D. C. & H. C. Reed & Co. having a license in the eastern territory.

One-half interest in No. 239,947.

Patent No. 197,515, all right for western territory.

One-third interest in patent No. 224,274. } For western territory.
" " " " 224,275.
" " " " 224,273.
" " " " 235,071.
" " " " 233,718.

495 One-half interest in patent No. 205,449 for all United States, except Illinois and Wisconsin, in which States they have no interest, but they have entire interest in Michigan and Indiana.

One-half interest in patent No. 197,703 in all United States, except Wisconsin and Illinois, and they have all Michigan and Indiana.

One-fifth interest in patent No. 446,820.

SCHEDULE "B."

Charles H. Childs & Co.

Patent No. 378,081.
" " 358,839.
" " 348,544.
Reissue { Patent No. 346,266.
" " 10,893.
Patent No. 393,344.
" " 360,975.
" " 413,352.
" " 428,310.
" " 262,918.
" " 251,208.
" " 227,683.

Application, patent No. 294,082.
" No. 362,626.
" " 393,108.
" " 393,156.

Exclusive owners of eastern territory under 370,915. Application for reissue pending.

One-fifth interest in patent No. 446,820.

Exclusive ownership of patent No. 405,580. Stevens has the right to use it. Eureka Mower Co. has shop right.

496 One-third interest in patent No. 201,946, in eastern territory, subject to the paid-up license of Taylor & Henry and W. S. Lawrence, subject also to a license to D. C. & H. C. Reed & Co., C. H. Childs & Co. also has license to sell in western territory.

Patent No., 233,718.

One-third interest eastern territory.

SCHEDULE "C."

A. W. Stevens & Co.

Patent No. 396,696.
" " 416,995.
" " 419,971.
" " 428,329.
" " 390,065.
" " 392,312.
" " 405,459.
" " 392,311.
" " 371,902.
" " 412,428.
" " 374,159.
" " 371,903.
" " 375,510.
" " 375,511.

One-third interest in patent No. 201,946, in eastern territory, subject to the paid-up license of Taylor & Henry, and W. S. Lawrence, subject also to a license to D. C. and H. C. Reed & Co., A. W. Stevens & Co. also has license to sell in western territory.

One-fifth interest in patent No. 446,820.

One-third interest in patent No. 233,718, in eastern territory.

497 SCHEDULE "D."

Taylor & Henry.

Patent No. 434,110.
" " 250,065.
" " 309,800.
" " 244,100.
" " 245,718.
" " 224,722.

" " 264,360.
" " 271,938.
" " 309,416 } Except Steuben and De Kalb Co., Ind. and
" " 327,340 } Kent Co. Mich.
" " 337,951 }
" " 278,287.

One-third patents No. 224,273, }
" " " 224,274, }
" " " 224,275, } For western territory.
" " " 235,071, }
" " " 233,718. }

One-third interest in patent No. 241,528.
" " " " 256,348.
" " " " 284,778.
One-fifth " " " 446,820.

Paid-up license in eastern territory and license in western territory under patent No. 201,946.

SCHEDULE " E."

W. S. Lawrence.

Patent No. 232,192.
" " 379,018.
" " 359,539.
" " 301,375.

Paid-up license in the eastern territory and license in western territory under patent No. 201,946.

One-third interest for western territory in No. 224,273.
498 One-third interest for western territory in No. 224,274.
One-third interest for western territory in No. 224,275.
One-third interest for western territory in No. 235,071.
One-third interest for western territory in No. 233,718.
One-third interest 241,528.
" " 266,348.
" " 284,278.
One-fifth interest in patent No. 446,820.

SCHEDULE " F."

Eureka Mower Co.

Patent No. 413,498.
" 413,499.
" 386,021.
Shop right under Markham patent No. 405,580.

SCHEDULE "G."

Hench & Dromgold.

Patent No. 402,079.
" 419,990.

SCHEDULE "H."

E. Bement & Sons.

One-half interest in reissue patent No. 10041, original 144,236.
One-half interest in No. 222,542, reissue 10082.
Also No. 399,731.
Contracts with La Dow, which give it the right to make the Steel King, under patents.
Nos. 441,367, Nov. 25, 1890.
Nos. 450,964, Apr. 21, 1891.
Nos. 451,422, Apr. 28, 1891.
499 And all other La Dow patents, pertaining to the "Steel King" structure. E. Bement & Sons has indemnified "the National Harrow Company" against all liabilities from La Dow, and releases the company from defending it on any litigation with La Dow, growing out of the contracts with him, or the patents owned by him, so far as applicable to the "Steel King."

SCHEDULE "I."

D. B. Smith & Co.

Patent No. 449,649.
" " 453,672.
" " 423,705.
Application, 371,411.
Rights under, 446,820.

SCHEDULE "J."

The Farmers' Friend Mfg. Co.

Patent No. 434,962.
Application, 371,555.
Number application, unknown. Allowed.

SCHEDULE "K."

George Sweet & Co.

Patent No. 361,792.
" " 367,462.
" " 386,094.
" " 402,629.

SCHEDULE "L."

The Walker Mfg. Co.

Patent No. 421,789.
" " 426,695.

SCHEDULE "M."

L. C. Lull & Co.

Patent No. 410,596.
One-half interest in patent No. 426,666.
Sole owner of application June 15th, 1891.

500 SCHEDULE "N."

Herndeen Mfg. Co.

Patent No. 401,833.
" " 359,970.
" " 382,304.

SCHEDULE "O."

The Williams Mfg. Co.

One-half interest in patent, No. 400,398.
" " " " " 400,397.
Some right in patent No. 426,666.

SCHEDULE "P."

D. O. Everest & Co.

One-half interest in patent No. 400,398.
" " " " 400,397.
" " " " 426,666.
" " " " 239,947.

SCHEDULE "Q."

Childs & Jones.

Application No. 323,928.
Other application. Number unknown.

SCHEDULE "R."

The McSherry Mfg. Co.

A contract by which Charles Ladow of Albany, licenses said company to manufacture their style of harrow under certain patents held by La Dow.

The award in this case is made under the condition that the McSherry Mfg., Co., executes to "the National Harrow Co.," a contract in substance similar to that of E. Bement & Sons.

501 Before proceeding the arbitrators took the ordinary oath.

It is conceded that stock was issued to the parties to whom the arbitrators awarded it or to their appointee as stated in the report of the arbitration. That thereafter the National Harrow Com-

pany of New York was dissolved by legal proceedings and its affairs legally wound up and a decree entered to that effect in the supreme court of the State of New York in and for the county of Oneida.

Cross-examination.

By Mr. RISLEY:

I remember the circumstances of there being a contract between G. B. Olin & Company and Reed & Cooper for a limited territory in the State of New York, where they had the right to sell Olin's harrows, being in existence on the 8th day of October, 1890.

The Reed & Cooper contract with Olin expired September 1, 1891. That was the subject considered by the board of directors at its meeting in October, 1890.

The Reed & Cooper contract originally was of a continuing nature, and the board thought it was wise to have it terminate at some fixed time, so there would be an end to it; some fixed date and they passed a resolution to that effect that the contract should terminate on the first day of September, 1891.

Q. In the interim between that date and the first day of September, what was Olin, or the parties who bought out Olin required to do, so far as the company was concerned to protect it against those contracts, state the action of the board on the subject?

Mr. COOKINHAM: I object to this as incompetent, immaterial, irrelevant and not cross-examination of the witness.

502 The REFEREE: He may state the action of the board on that subject.

Exception.

A. Resolution adopted at the meeting on the 8th of October, 1890, at the Broezel house in Buffalo, the resolution being offered by Mr. Bement; that part, that is pertinent to the question is as follows:

"National Harrow Company on such terms, (referring to the sale of Olin's business to Reed & Company) and may be mutually agreeable to Reed & Company and G. B. Olin & Company, subject to all rights under the Reed and Cooper contract which shall be filed with the treasurer and shall be continued until September 1, 1891, subject at that time to a continuance according to its legal status, and if the corporation has the power to then cancel the same, it shall be optional to terminate the same. And Reed & Company shall guarantee that Reed and Cooper shall not sell harrows at a less price or on more favorable terms and prices than those prescribed by the company, and in case Reed & Company do sell on more favorable terms than prescribed, then Reed & Company shall refuse to deliver any more harrows to Reed and Cooper on the contract and to guarantee the National Harrow Company and its licensees against loss and damage on account thereof."

At either the September or October meeting of the directors at Buffalo in 1890, I remember that some papers with relation to

transfer-ing the good will of the parties' business was delivered to Mr. Howard to be held by him in escrow. After the October meeting of the board of directors at Buffalo, I know there was a meeting of the executive committee for the purpose of executing agency contracts to different parties. The minute book at page 31 states who was present at that meeting. Meeting of the executive committee held at the office of Risley and Perry at Utica, N. Y.,
503 December 16, 1890. Present, Charles H. Childs, A. O. Bement, L. W. Stevens and Frank J. Henry, full board.

Clause third of the resolution passed at that meeting reads as follows: "The license to E. Bement & Sons granted and signed with instructions to hold the same until E. Bement & Sons had assigned their patents to the National Harrow Company and executed a contract indemnifying the company against damages arising from the sale of harrows by George Tyler & Company at a less price than the National Harrow Company, and when the papers were executed and delivered to the National Harrow Company, the license to be delivered."

Q. Did Mr. Bement ever execute and deliver to the company, the paper referred to, to protect them against the Tyler contract?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant. It is not in reply to anything that I have called out by this witness, neither is it in reply to what I have asked any other witness.

Objection overruled. Exception.

A. No sir. The license contract referred to in the resolution read was not to my knowledge ever delivered to Mr. Bement or his firm.

Q. Did the National Harrow Company as far as you know, or any of its officers, ever make any arrangement with Mr. Bement, by which he was authorized to sell harrows to George Tyler & Company of Boston, on any different terms than those specified in the license contracts in suit?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant, not within the pleadings and not cross-examination; not in reply to anything proven by the defendant.

Objection overruled, exception.

A. Not that I know of.

Q. At the meeting of the directors in Murray Hill, New
504 York, at the annual meeting in September, 1892, did Mr. Bement or any other officer or employee of the National Harrow Company report to the board, that the company could not grant any lever harrow licenses, because the company had already licensed Blaker to build a lever harrow?

Mr. COOKINHAM: Same objection as last stated, and also that it is leading.

Objection overruled, exception.

A. No such report was made to my knowledge.

Q. Was there anything said on that subject, if so, what was it?

Mr. COOKINHAM: Same objection.
Objection overruled, exception.

A. The matter was not brought up at all to my knowledge, by any one.

Mr. Blaker was present when the Bement resolution to grant lever harrow licenses adopted at that meeting was passed. He was not present at Auburn, I think.

Conceded that the life of a U. S. patent is seventeen years from date of issue.

Reed & Company purchased the business, property and assets of G. B. Olin & Company. Part of it. The good will of their business and the stock of spring tooth harrows.

I think G. B. Olin & Company retired and have continued out of that line of business. The price the company paid to purchase the patents and patented rights from G. B. Olin & Company was $16,000. It was an out-and-out purchase by the New York company from G. B. Olin & Company. The company purchased and obtained the Batchelor & Van Gelden patents specified in the contract in suit from the parties and paid $3,000 for it. They purchased what is known as the D. B. Smith Company's patent of youngest date from five or six of the parties and paid $2,500 cash for it. They pur-
505 chased some patents from the Pitts agricultural works, and paid for them in the stock of the company after the arbitration, as I remember $20,000. Also some patents of the Syracuse Chilled Plow Co., and paid, I think, about $25,000, for them in the stock of the National Harrow Company of New York. Also some patents of the North-Molitor Company of Lansing, Michigan, that was the New Jersey company, I think, and paid for them, $2,500, in stock of the National Harrow Company. We have bought other patents. We bought a patent known as the "Warner" patent, paying $1,500 for it, cash. That is the only patent I recall. I have purchased patents for the New Jersey Company, plaintiff.

One known as the Wentz patent, for $300. Brooks patent of York, Pa. I think we paid $300 or $350; and we bought a patent of a party at Millington, Michigan, for $400. One of L. D. Swartz of Auburn for $350.

At the time the directors of the New York corporation voted to grant the agency license contracts on the 16th of December, 1890, there had been executed to the New York company separate assignments of quite a good many patents from parties who were granted licenses. After that date there were other patents assigned, and assignments required by parties who were voted to be granted a license at that time.

I believe the assignments which were executed were all on printed forms, and I think nearly all of the same date, September 10, 1890. From that time on down to the period of the arbitration from time to time, different parties executed separate and distinct assignments of letters patent to the company. Neither E. Bement & Sons nor did any member of the company ever execute and deliver to the

company any assignment of any patent, until either the 16th or 17th of June, 1891.

Q. In point of fact, was there any agreement or obligation
506 in any way existing in the form of a contract or agreement between the defendant E. Bement & Sons and the plaintiff, except the agreement in writing, dated the 17th day of September, 1890.

A. Not to my knowledge.

Mr. COOKINHAM: I object to it because, inferentially, it was made to appear that the contract dated September 17th, existed, whereas that fact is not proven.

Mr. RISLEY: The plaintiff's counsel states that hereafter he will make proof of the existence of that contract and its execution.

Q. Will you please state, Mr. Brinkerhoff, the license granted by the National Harrow Company on float spring tooth harrows, where the teeth were fastened to the frame or to some attachment to the frame, rigidly where they were non-adjustable?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant, and not cross-examination.

Objection overruled. Exception.

A. Such licenses were granted to John G. Higgins, Charlestown, Maine; Childs & Jones, D. B. Smith Company, Utica; Herndeen Manufacturing Company, Hench & Dromgold, D. C. and H. C. Reed Company, Kalamazoo, Michigan; D. M. Osborne & Company, Auburn, N. Y.; Syracuse Chilled Plow Company, Syracuse, N. Y.; Walker Manufacturing Company, Moravia, N. Y.; Pitts Agricultural Works, Buffalo; Gale Manufacturing Company, Albion, Michigan; Buchler & Gibbs Plow Company, Canton, Ohio, and George Sweet & Company, Dansville.

Q. Please state the licenses and to whom granted on float spring tooth harrows where the teeth were adjustable, either on the frame or on some stationary portion attached to the frame.

Same objection, ruling and exception.

A. Such licenses were granted to the following parties:
507 Charles H. Childs & Company, Childs & Jones, D. B. Smith Company and the Eureka Mower Company, Utica, N. Y., Syracuse Chilled Plow Company, Syracuse, N. Y.; D. C. and H. C. Reed, Taylor & Henry, L. C. Lull & Company, W. S. Lawrence, Williams Manufacturing Company, Lever Spring Tooth Harrow Company, Kalamazoo, Michigan, D. O. Everest & Company, Pine Grove, Michigan. Farmers' Friend Manufacturing Company, Dayton, Ohio; D. E. McSherry Company, Dayton, Ohio; E. Bement & Sons, North-Molitor Manufacturing Company, Lansing, Michigan.

Q. Will you please state the licenses granted by the National Harrow Company and to whom granted, for lever float spring tooth harrows where the teeth were bolted rigidly to the bar or some portion of the harrow?

Same objection, ruling and exception.

A. Such licenses were granted to the following parties: D. B. Smith Company, Childs & Jones of Utica; D. M. Osborne & Company, Auburn; Pitts Agricultural Works, Buffalo; Reed & Company, Kalamazoo, Michigan; Gale Manufacturing Company, Albion, Michigan; Buchler & Gibbs Company, Canton, Ohio; Hench & Dromgold; A. Blaker & Company, Newtown, Pa.; E. Bement & Sons, Lansing, Michigan; and the North-Molitor Company, Lansing, Michigan.

Q. Please state the lever float spring tooth harrows on which the company granted licenses and the persons to whom the licenses were granted, where the teeth were made independently adjustable to some part of the frame to which they were attached?

Same objection, ruling and exception.

A. Such licenses were granted to the following parties: Childs & Jones, C. H. Childs & Company, D. B. Smith Company, Eureka Mower Company, Utica, N. Y.; Syracuse Chilled Plow Company, Syracuse, N. Y.; Stevens & Son, Auburn, N. Y.; Pitts Agricul-
508 tural Works, Buffalo; Blake & Blake, Racine, Wisconsin; D. C. & H. C. Reed & Company, L. C. Lull & Company, W. S. Lawrence, Lever Spring Tooth Harrow Company, Taylor & Henry, D. O. Everest, Bulcher, Gibbs Plow Company and the Gale Manufacturing Company.

Q. Please state whether these licenses were accepted by the respective parties to whom they were granted, stating the exception, if there is any, who have not?

Same objection. Ruling and exception.

A. They are already accepted with the exception of E. Bement & Sons, the North-Molitor Manufacturing Company, and L. C. Lull & Company.

Q. Has L. C. Lull & Company reported and paid their royalty on their harrows?

Same objection. Ruling and exception.

A. I am advised that they have.

Q. Will you please state, Mr. Brinkerhoff, the licenses which you have referred to, which have been transferred to the Standard Harrow Company?

Same objection. Ruling and exception.

A. C. H. Childs & Company, Eureka Mower Company, Childs & Jones, D. B. Smith Company, Utica, N. Y.; Herndeen Manufacturing Company, Geneva, N. Y.; Walker Manufacturing Company, Moravia, N. Y.; George Sweet & Company, Dansville, N. Y.; D. C. & H. C. Reed & Company, W. S. Lawrence, Lever Spring Tooth Harrow Company, Williams Manufacturing Company, Kalamazoo, Michigan; D. O. Everest, Pine Grove, Michigan; Farmers' Friend Manufacturing Company, Dayton, Ohio; A. Blaker & Company, Newton, Pa.; Blake & Blake, Racine, Wisconsin; A. W. Stevens & Son,

Auburn, N. Y.; the McSherry Manufacturing Company, Dayton, Ohio.

Q. After you sent duplicate copies of the lever float spring tooth harrow licenses to the defendant and to the North-Molitor
509 Manufacturing Company, did you receive any objection or notice in any manner from either E. Bement & Sons, or the North-Molitor Manufacturing Company, objecting to the form of the license in any way?

Same objection.
Objection overruled. Exception.

A. I did not.

Q. Did you, as secretary and general manager of the National Harrow Company, know before yesterday, that Bements were selling and had sold a harrow having curved teeth with reinforcing springs attached to the frame and bearing on the teeth to reinforce their strength?

Mr. COOKINHAM: Same objection.

The REFEREE: I will receive the answer, not as cross-examination, but in the line of rebuttal, the witness being now here present, and it is received as though the witness was called in rebuttal, after the defendant rested the case.

Exception.

A. I did not.

Mr. RISLEY:

Q. So far as you know, has the National Harrow Company, or either of the companies, granted, or consented in any way to the sale of such harrow by the Bements?

Mr. COOKINHAM: Same objection.
Received in the same way as the last answer.
Exception.

A. Never any privileges of that kind were granted to E. Bement & Sons.

Mr. RISLEY:

Q. Has the plaintiff refused to license any responsible manufacturer, who has presented a harrow and asked to be licensed where the structure was claimed to be covered by any of the plaintiff's patents?

Mr. COOKINHAM: I renew my objection.
510 I object to the question whether it was covered by their patents or not.
Objection overruled, exception.

A. They have not, unless some would conflict with outstanding licenses.

Mr. RISLEY:

Q. Please state if the company has refused to license any party that has applied for a license and who?

Same objection, ruling and exception.

A. Not to my knowledge.

Redirect examination:

The original Bement papers were in escrow, pending the fulfillment on the part of the Bements of some requirements as regards transferring patents and I believe some matters in connection with the La Dow interest, damages or something of that kind. As I recollect there was a memorandum attached to the Bement papers and later on, prior to the arbitration, that paper was delivered to Bement with the memorandum fastened to it, but it was not to become operative until certain things were performed; these were embodied in the contract made by Mr. Risley, as to the La Dow matters and delivery to those papers; the papers so far as I recollect were never in Mr. Bement's case operative until the arbitration. The old papers were never operative. That arrangement in regard to Mr. Bement and the National Harrow Company and La Dow was Mr. Bement had a contract with La Dow to pay him certain royalties on account of spring tooth harrows, and the company did not know what might grow out of that contract, and claims that might be made by La Dow against them or any of their licensees, and they asked Mr. Bement to indemnify the company, with a satisfactory bond and he gave the bond June 17, 1891.

511 The arrangement which Mr. Risley made with the defendant in regard to the La Dow matter was the National Harrow Co. was to assume the La Dow contract which was subject to the approval of the board of directors. That is the agreement made with the defendant on the 17th day of the previous September. I think that is the date. The board refused to ratify that agreement the 27th, or 28th of May, 1891. From the 27th or 28th of May, 1891, down to 17th of June, 1891, there *was* no operative papers between the defendant and the National Harrow Company. Not only at that time, but there never had been to my knowledge up to the 16th day of June, 1891. And these Exhibits 1, 2, 3, 4, and 5 were signed and delivered, either the 16th, or 17th day of June, 1891, that is my best recollection. In regard to the meeting in New York in September, 1892, I can't answer whether or not Blaker was in the room and heard the report that was made in regard to lever spring tooth harrows licenses. I know he was at the meeting. Can't give you the date when the plaintiff purchased any patents, except those that they obtained from the licensees, prior to the arbitration; on various dates.

These patents that were purchased for money, were all purchased by the company after the arbitration, I believe. The defendant assigned its patents and patented rights to the National Harrow Company of New York, at or about the time it assigned the papers

referred to June 17th, 1891. I think the National Harrow Company of New York and the plaintiff have refused to allow parties to make harrows under the patents owned by the companies. E. Brooks, York, Pa., Buchler & Gibbs Plow Company, Canton, Ohio; Gale Manufacturing Company, Albion, Michigan, and Frye of Maine, Ira Hunt of Kalamazoo. These people were refused licenses for various reasons, particularly on account that those asked for, conflicted with those already granted, and for the irresponsibility of parties to pay royalties and keep the contracts.

512 I never saw the harrow made by the defendant called the "Lansing harrow," to my knowledge.

The licensees of the National Harrow Company, who transferred their licenses to the Standard Harrow Company, have gone out of business of manufacturing spring tooth harrows. Individually I think they have. They sold out their business. The lever licenses were mostly voted on November 3, 1892, and since then it has been in the hands of the executive board, but when it came to be fixed up with the parties I have done it usually.

I think no stock was given by the National Harrow Company for any rights obtained from any licensees after we fixed up with the Pitts Agricultural Works of Buffalo. We did not give Blaker any stock on account of his being licensed; he gave us stock—he paid.

Recross-examination.

By Mr. RISLEY:

Q. At the time the National Harrow Company of New York was organized there was a large number of patent lawsuits pending by parties against each other at that time for infringement of patents.

Mr. COOKINHAM: I object to it as incompetent, immaterial, reopening plaintiff's case, and not cross-examination.

Objection overruled. Exception.

A. There was.

Mr. RISLEY:

Q. Now for several years prior to the organization of the National Harrow Company, had there been conducted a very sharp controversy between the manufacturers of spring tooth harrows in which thousands of dollars had been expended in litigation?

Same objection. Ruling and exception.

A. There had.

Defendant rests.

513 EDWIN D. METCALF, a witness called on behalf of the plaintiff in rebuttal, being duly sworn, testified as follows:

Examined by Mr. RISLEY:

I am 45 years old; residence, Auburn, N. Y.; and I am general manager and treasurer of D. M. Osborne & Company, manufacturers

of agricultural implements. D. M. Osborne & Company manufacture and market and have for a number of years, manufactured and marketed a large and extensive line of agricultural tools and implements. A part of their business has been the manufacture and sale of harrows employing spring curve teeth. In 1890, our first experiments were made in the manufacture of harrows having curve spring teeth. I cannot give the approximate number in 1891; it was quite large. We have manufactured harrows, employing curve teeth in 1892 and subsequent years, to a considerable extent. Our company manufactured and marketed in the year 1892, lever float spring tooth harrows.

Q. Please describe in a general way, the class of harrows which your company marketed in the season of "1892" where curved teeth were employed?

A. Our spring tooth harrow had an angle-bar frame with pipes across it, upon which was fastened the curved teeth, spring teeth we call them, and connecting with these pipes, was a cross-bar to which was attached a quadrant and a lever for the purpose of shifting the position of the teeth of the harrow.

Mr. COOKINHAM: I object to this and move to strike it out as incompetent, immaterial, irrelevant and a reopening of the plaintiff's case.

Objection overruled, exception.

514 Q. Mr. Metcalf, were the harrows described in the answer to the last question, the same harrows that you have marketed under the license contracts, which your company had with the plaintiff, The National Harrow Company?

A. It was.

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled, exception.

By Mr. RISLEY:

Q. Does the attachment of the lever and its operation to a float spring tooth harrow in the trade, take it out of the designation of a float harrow, as understood in the trade?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled, exception.

Plaintiff's counsel states, that he does not offer this line of evidence, except as contradictory of the defendant's witnesses, wherein they stated, that the addition of the lever adjustment of the teeth, and some other features, took harrows having those features out of the category or classification of float harrows in the market, as to that line of evidence, we offer this evidence strictly in contradiction of their statements.

The REFEREE: I will reserve it for the present and the question may be answered to a ruling to be entered in the minutes, which

will either admit the testimony or strike it out. Either party to have an exception when the ruling is made.

(WITNESS:)

A. It does not.

The adjustability of the teeth independently on the frame does not enter into the classification of a harrow as a float. The attaching of the curve spring teeth to the harrow frame rigidly, does not take the harrow out of the designation of float. Simultaneously adjusting the teeth on the independent bars, and holding them
515 when adjusted does not take the harrow out of the classification of a float. The action of turning the harrow upside down and drawing it on the bows of the teeth does not enter into the classification of harrows as float or otherwise. As a matter of fact from my observation and use of these harrows, having curved teeth, other than wheel harrows, they are not, to any extent, drawn from field to field on the bows of the teeth, with the harrow turned upside down.

It would weaken the springs very materially by wear at the point where the greatest spring comes on the teeth, to draw them in that way.

Q. Were you at Detroit in the fall of 1894, at a meeting of some of the licensees of the National Harrow Company, when Arthur O. Bement was present, and if so, state when and where and the particular occasion of your being there?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and a reopening of the plaintiff's case.

Objection overruled, exception.

A. I was there the first part of September, 1894, the meeting was called at the Cadillac hotel. A representative of Reed & Company, a representative of the Pitts Agricultural Company, a representative of Bement & Sons, a representative of Lull & Company, and myself and Hench & Dromgold were there.

Q. Was the meeting organized by the election of a chairman?

Mr. COOKINHAM: I object to that as incompetent, irrelevant and a reopening of the plaintiff's case.

Objection overruled. Exception.

A. It was. Mr. Arthur O. Bement was elected.

(WITNESS:) I would like to correct one thing I said; I said that Mr. Reed was there; he was present at the hotel, but this meeting was in one of the rooms and he was not present there, that Mr. Bement was chairman of.

516 Q. When, Mr. Metcalf, did you make known to the plaintiff's counsel, the conversation which Mr. Bement had at the meeting at Detroit, to which you have referred to?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant.

Objection overruled, exception.

A. About thirty minutes ago.

Cross-examination:

Have had practical experience in the use of spring tooth harrows ever since we commenced manufacturing them; largely experimental and has been ever since I looked after that branch of the company's business as general manager of the company. If a spring tooth harrow was drawn upon its back and transported through the meadow or pasture upon the bows of the teeth, I think it would wear the teeth to some extent. I think sliding along on the ground would wear the teeth same as a sled or sleigh, the runners wear very quickly, no matter how smooth or soft it is; the friction does. Gravel would wear it quicker than loam would. It is principally the gravel that is in the earth that wears steel. I don't say that farmers don't use the old float spring tooth harrow, by throwing it upon its back and drawing it from one field to another. It is not generally done. As a matter of fact, farmers don't use them with the judgment that manufacturers would use them.

A democrat wagon is a square box wagon with wheels, axles, shafts or pole. I should consider them all essential. If you put a top on it it would be, I suppose, a democrat wagon, if you should take the springs off.

I am not familiar enough with the wagon trade to know what they would class it as.

I do not see anything descriptive about the word "democrat" as applied to that wagon.

517 The word "float" as applied to a harrow is a trade term.

We advertise our harrows. I don't recollect advertising a harrow as a lever float spring tooth harrow. I may have written it in a letter. I think I have in my life in writing a letter used the term "lever float spring tooth harrow" in corresponding with the National Harrow Company, but not in trade. In the trade there is something known as a "lever float spring tooth harrow." It is called that way. By word of mouth, and by advertising, I think we were the first ones that introduced a lever.

Q. Tell me one concern that makes a lever spring tooth harrow that advertises it as a lever float spring tooth harrow?

A. I am not familiar with our competitors' advertisements.

I see the agricultural papers that advertise agricultural implements. We take a large number of them and I examine them.

I cannot designate one concern that manufacturers spring tooth harrows, that advertises a "lever float spring tooth harrow." I am not familiar with my competitors' advertisements. We don't advertise in that way.

In correspondence with our customers we don't use the term "lever float spring tooth harrows." I have seen the term "lever spring tooth harrow" used in correspondence; I have seen customers' letters, but I do not recollect from whom or when, very often, when we commenced to manufacture them, now they are all designated as 16 or 17 teeth.

Q. Do you mean to say, Mr. Metcalf, when you first commenced manufacturing that customers called for, "lever float spring tooth harrows"?

A. They called for the prices of our float spring tooth harrows.

518 Q. Did they use the term, lever float spring tooth harrows?

A. I couldn't say. I know the word "float" has been used in correspondence to us, not by us, but to us.

Q. Are you able to state that you ever received a letter in which a customer called for a lever float spring tooth harrow?

A. I can't definitely state that; I know they use the term "float," and the only harrow we made had a lever to it.

Q. Did you ever see the term "lever float spring tooth harrow," except in connection with the National Harrow Company or its licenses?

A. I don't recollect, and still I may have; we have had a great deal of correspondence about harrows at various times. We make more than one style of harrow with spring teeth. Four kinds: 15, 17 and 23 tooth, and a 16-tooth combination. The combination is a different style, a 16-tooth with peg teeth on the rear and a shoe on the front, with a lever. All our spring teeth harrows have levers. We never made the ordinary float spring tooth harrow. We took the license from the National Harrow Company. We took it because we had several patents pending in Washington in improvements on our harrows and they had several patents which they claimed we conflicted with, and while our patents were pending we considered it a good policy to make some arrangement rather than to be in litigation. It was a question of business policy. Because we thought it was cheaper to do it than not to, pending settlement of certain questions, concerning patents we considered it profitable. And that has not been settled, the patents.

I would describe a float spring tooth harrow as a harrow in which the frame is not suspended to anything else; a spring tooth

519 in which in operation, the frame would vibrate or float or move and not be stationary as it is in a peg tooth or disc harrow. I am describing the harrow; by my explanation it is descriptive. It is true, that the term float spring tooth harrow was originally applied to a plain harrow without lever or shoe or wheels. And before any lever harrow was ever made, it meant that, and that only. We were the first ones that made a lever harrow which was considered commercially a success; that was in 1891, our first harrow was put out. In 1892 large numbers, but in 1891, we put some. In 1891, we did not sell thousands but hundreds, I should say. The fall of 1891. Before that I had never seen a lever harrow in the market. I don't know when the Blaker harrow was first put on the market. All spring tooth harrows which have a lever, are now known to the trade as lever spring tooth harrows. That is the trade term that designates them, I think.

We advertise ours as so many teeth, 17 spring tooth harrow. Sometime- we advertise as so many teeth, Osborne harrow. I don't recall that I ever saw a lever harrow advertised by any manufacturer, except as a lever spring tooth harrow.

Redirect examination:

In 1892, when we were selling our lever float spring tooth harrows, there was a large number of suits brought against our company by the National Harrow Company, alleging that we were infringers of their patents. I think about fifty suits. And when we took the licenses to which I have referred from the National Harrow Company, those suits, those controversies were then pending; and upon those licenses those suits were discontinued, and the controversy between the National Harrow Company and D. M. Osborne & Co., over pending applications for patents on lever harrows,
520 is still pending in the Patent Office. And it was one of the purposes of this license, to bridge over, until those rights were determined and both companies knew where they were. That was specified in the first contract.

There is a class of harrows known, and has been known, for a good many years as wheel spring tooth harrows, in connection with cultivators. I think that class of harrows has levers. There is a classification known in the harrow trade as a disc harrow. I don't know as there is such a subclassification of the same class, as split disc; there is a spade harrow and a shear disc; all of which are disc harrows; we have two kinds. There is such a classification known in the trade as a spike tooth, some call them spike and some peg tooth. There are lever peg tooth harrows. We have built them with levers.

Recross-examination.

By Mr. COOKINHAM:

By a peg harrow I would understand it was a harrow with a lever, if I was ordering it from Osborne & Co.

Q. If you heard some one say that it was a peg tooth harrow, you would not understand that it had a lever?

A. It would depend on who was making it.

Q. By the term "peg tooth" it is not implied, that it has a lever; the name peg tooth would not designate whether it had a lever or without a lever?

A. No, it depends upon who was making it.

Q. When the contract was made between you and the National Harrow Company, the question didn't come up at all whether this was a float spring tooth harrow did it?

A. They designated it as such.

Q. You didn't discuss it between yourselves?

A. No, because we recognized the fact.

Q. There was no discussion between you?

521 A. No discussion. The discussion between us was in regard to other matters. But we assumed and they assumed that our harrow was covered. D. M. Osborne & Co. did not get frightened about the fifty patent suits that were brought against them by the National Harrow Company.

CHARLES H. CHILDS, recalled by plaintiff in rebuttal, testified as follows:

Q. Mr. Childs, what amount of money did your firm pay to G. B. Olin & Company and Reed, for the right to build your harrows under patents which they owned before the organization of the National Harrow Company of New York?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled, exception.

A. I think about $10,000.

Mr. Risley states Lawrence Chapin & Company paid $25,000.

Mr. Leroy W. Stevens states they paid a dollar on every harrow, and we paid between $30,000 and $40,000, to my recollection.

Mr. RISLEY:

Q. Mr. Childs, was there ever to your knowledge, any arrangement or talk between any of the officers of either the New York Company or the plaintiff, and Arthur O. Bement or any of the representatives of that firm, to the effect that they might deliver and sell harrows to George Tyler & Company of Boston, at prices or on terms differing from those provided in the licenses, except on the terms specified in the vote of the directors on that subject.

(The resolution of the company referred to is on page 31 of the minute book, read by Mr. Brinkerhoff on the stand.)

522 Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant, not in answer to any fact proven by the defendant; a reopening of plaintiff's case and not within the pleadings.

Objection overruled, exception.

A. Not to my knowledge.

I do not remember at the meeting of the directors at Murray Hill in September, 1892, that Mr. Bement made any report to the board, as on or about, in a *sub rosa* way, to the effect, or on the subject that no lever harrow licenses could be granted by the plaintiff, because the plaintiff had licensed Paul Blaker to build a lever harrow.

Q. Mr. Childs, does securing by bolt or other device, the curve spring teeth rigidly to the frame bars of a harrow, have anything to do about classifying the harrow as a float harrow or as a non-float harrow?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and a reopening of plaintiff's case.

The REFEREE: I think for the present I will receive it.

Exception.

A. I should think not.

I should not think that the securing of the curve tooth to the frame bars, so that the teeth are independently adjustable on the frame, in the direction of their length and fastened to the frame

when adjusted, the adjustability would have anything to do with classifying the harrow as a float or a non-float harrow. I should not think that the fact that a spring tooth harrow having teeth curved above and below the frame bars, so that when the harrow is turned bottom side upwards, the harrow can be drawn or transported on its bows, enters into the question, whether a harrow is a float or a non-float harrow. I should not think that the application of a lever and its connecting mechanism for simultaneously adjusting the teeth on one of the sections of the frame determines whether the harrow is a float or non-float harrow. I have never seen the farming community, that use spring tooth harrows, use them to any extent bottom side upwards, as a means of transporting them from field to field, when the harrow is to be used. I have never seen them used in that way. I have never seen them used in the fields to a very great extent. To use them that way would necessarily weaken the teeth.

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LEROY W. STEVENS, recalled by plaintiff in rebuttal, examined, by Mr. Risley, testified as follows:

I do not know of any arrangement expressed or implied being made with Mr. Bement for his company, or with any other member of his company, by which either of the National Harrow companies consented that he might sell his harrow to George Tyler & Company for less prices, or on more favorable terms than the licenses permitted. I know of no such arrangement other than what was entered on the record of the company on page 31. Not to my knowledge did Mr. Bement or his firm sign and deliver a contract indemnifying the company as required by that resolution.

Q. Did Mr. Bement at the New York meeting in 1892, in September make a report or state to the board of directors, in your hearing or to your knowledge, that the company could not grant any lever harrow licenses, because the company had already licensed Blaker to build a lever harrow?

Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and not in answer to anything proven by the defendant.

Objection overruled, exception.

A. I have no knowledge of ever hearing any such statement made. I have no recollection of it.

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The question of classifying a float harrow does not depend in any way upon whether the teeth are bolted rigidly to the frame where curve teeth are employed. The independent adjustability of the teeth on the curve spring tooth harrow, does not in my opinion, determine or enter into the classification of it as a float.

The application to a curve spring tooth harrow of a lever and its attachments for adjusting the teeth on the harrow frame enter into the determination of the question, as to whether the harrow is a float harrow or not.

A. Well, it would not be classified as a float harrow, it would be classified as a lever.

Q. Well the question is, Mr. Stevens, whether the lever harrow is a float harrow; whether it is classified, because of the lever one way or the other?

A. Well, it is classified of course differently from the float harrow, it is called a lever harrow.

Q. Now will you please state, whether the term "float" has got to be applied to a harrow, because it can be drawn on its bow bottom side upwards; whether that determines the classification?

A. Not necessarily.

EDWIN S. RISLEY, called in rebuttal as a witness for the defendant, testified as follows:

On the 17th of September, 1890, I went to Lansing, Mich., to see E. Bement & Sons with reference to matters pertaining to the National Harrow Co. I met at their office in Lansing, Mich., Arthur O. Bement; this was my first meeting of any of the Bements. I stated to him, that I had come to see them with reference to going into the National Harrow Company. I stated to him the number of directors of the corporation, which the articles authorized and explained to him that there had been a meeting at Buffalo from the 10th to the 11th of September, where they had adopted by-laws; I told him who was present at the meeting, and he inquired of me what,
525 provided they should go into the business the kind of license we proposed to grant to his company, and what would be the right of his company under the licenses. I said to him in substance that a form of license had been drawn up, but that it was still subject to amendments and changes and as I remember, I exhibited to him the form of the assignment of the good will of his business and his float spring tooth harrow business, and a draft of the license which was expected to be given to those who came into the company. He raised the question, as to whether the word- "float spring tooth harrow" would embrace their spring tooth wheel harrows——

Mr. COOKINHAM: I want to object to this as incompetent, immaterial, irrelevant and reopening plaintiff's case. This proof should be given in the first instance, not now. I ask to strike out the last part of the answer. All that which pertains to the license or the harrow.

Mr. RISLEY:

Q. In that interview was the subject of what the licenses were intended to cover by the word- "float spring tooth harrows" talked about and discussed?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and a reopening of plaintiff's case.

Excluded. Exception.

Mr. RISLEY: On that day a contract was signed and executed. I have here a copy of that contract and I now offer it in evidence.

Mr. COOKINHAM: I object to the contract as incompetent, imma-

terial, irrelevant and not in answer to any proof given by the defendant, reopening of plaintiff's case, and that the contract is not proven.

Mr. RISLEY: I will here state that the duplicate of the contract of which this is a copy, was delivered to Edward Norris, and as I understand it was destroyed, and I now offer the contract in evidence. The original contract was signed by E. Bement &
526 Sons by Arthur O. Bement, president, and by the National Harrow Company by Edwin H. Risley, attorney, and the paper I now hold is a copy of that paper. I compared this copy which I now hold with the original with Miss Ferguson a typewriter and stenographer, before delivering the original to Mr. Norris, and I now offer the paper in evidence.

Mr. COOKINHAM: I still insist upon my objection.

Objection overruled, exception.

Contract marked Plaintiff's Exhibit 136, February 16, 1895.

The contract reads as follows:

Memorandum of agreement made between E. Bement & Sons of the first part, and the National Harrow Company of the second part, as follows:

Whereas, E. Bement & Sons have this day executed a general assignment of all existing patents, pending applications and licenses for the manufacture and sale of float spring tooth harrows to the National Harrow Company subject always to the following conditions:

First. Arthur O. Bement is to be made a member of the executive committee of the board of directors of the National Harrow Co., by the resignation of one of its present members and his election to that place.

Second. The National Harrow Co. is to assume the obligations of E. Bement & Sons to Charles La Dow on account of royalties and to indemnify them from further payment thereon, or to arrange or adjust the matter to the satisfaction of both parties.

Third. The license of E. Bement & Sons is to permit the continuation of the contract with George Tyler & Co. to handle E. Bement & Sons' float spring tooth harrows in the New England States exclusively under the same arrangements as the National Harrow Co., made with G. B. Olin & Co., and with A. W. Stevens & Son.
527 All three of said firms are to be bound or obligated not themselves to sell in the same territory where their agents have said territorial rights, during the time they act as agents and that neither of the agents of said firms shall sell below the prices fixed by the National Harrow Co., and said three arrangements shall contain the same conditions and stipulations with reference to said territorial interests held by the agents of each of said three firms, and E. Bement & Sons will cancel their contracts with agents in Wisconsin, or make adjustments with the executive committee of the National Harrow Co. satisfactory to them with reference thereto.

Fourth. The general assignment of the good will of the business etc., is not to become operative until the conditions mentioned

herein are adjusted to the mutual satisfaction of E. Bement & Sons and the National Harrow Co. When so adjusted then the general assignment is to become operative; otherwise the same shall be void.

This memorandum of agreement is executed in duplicate; a duplicate being in the possession of E. Bement & Sons and Edwin H. Risley, attorney of the National Harrow Company and the original assignment of the good will of the business, etc., may be delivered by him to W. G. Howard, the same as the other parties have done who have become parties to the National Harrow Company, but such delivery to Howard and the delivery by him to the treasurer of the National Harrow Company shall not be held or construed in any event to be a complete delivery of said general assignment until all of the conditions of this memorandum of agreement are complied with and settled as stated herein.

Witnesseth our signature this 17th day of September, A. D. 1890.

E. BEMENT & SONS,
By A. O. BEMENT, *Pres.*
NATIONAL HARROW CO.,
By EDWIN H. RISLEY, *Att'y.*

528 Mr. RISLEY: On the same day E. Bement & Sons by Arthur O. Bement signed and delivered to me a bill of sale of their float spring tooth harrow business, trade-marks, right to the use of defendant's name including the right to manufacture and sell float spring tooth harrows.

On the next day, the 18th, I delivered the paper to William G. Howard of Kalamazoo. I explained and stated to Mr. Bement that Mr. Howard held similar papers in escrow, at that time Mr. Bement said to me that he——

Mr. COOKINHAM: I object to this as incompetent, immaterial, irrelevant and reopening of plaintiff's case.

Mr. RISLEY: That he was embarrassed by the fact that he had taken a license from Charles La Dow of Albany on which he was to pay royalty.

At the annual meeting of the directors at Murray Hill hotel in September, 1892, I made application to the National Harrow Company for permission to buy up and take an assignment of the licenses granted by that company——

Mr. COOKINHAM: I object to this as a reopening of plaintiff's case and it is incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Mr. RISLEY:

Q. What action did the board take upon your application?

Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and reopening of plaintiff's case.

Objection overruled. Exception.

A. They granted the permission by the resolution heretofore put

in evidence and after that and on the 19th of December,
529 1892, a formal contract was made and signed by the National Harrow Company by Charles H. Childs, president, and myself.

I offer this contract in evidence.

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant, in no way affecting the defendant, and a reopening of plaintiff's case.

Objection overruled. Exception.

Contract marked Pl'ff's Ex. 137. February 16, 1895, a copy of which reads as follows:

Whereas, the National Harrow Company, a corporation duly organized, is now the owner of a large number of letters patent and pending applications for letters patent of the United States relating to harrows, and under its said patents and pending applications for patent, it has licensed various persons, firms and corporations to manufacture and sell harrows according to the terms of the respective licenses and to employ in the manufacture and sale of harrows, the various patents applicable thereto upon stipulated terms embraced in said contract licenses;

And whereas, there is contained in each of said licenses so issued by the National Harrow Company, a stipulation in substance as follows:

"This license is personal to the licensee and is not assignable by the said licensee or by operation of law, except to the successor of the licensee in the same place and business, without the written consent of the licensor; nor shall the royalties or sums hereinbefore specified, cease to be paid under any circumstances whatever, except under the conditions named in this license during the continuance thereof."

And whereas, Edwin H. Risley of Utica, N. Y., has entered into contracts for the purchase of some or of all the licenses issued by the National Harrow Company, and is desirous of acquiring all rights, privileges and benefits accruing to each of the licensees of
530 said National Harrow Company, or such of them as are willing to dispose of the same, and to exercise, carry on, and conduct in such place or places in the United States as he may deem proper, the business authorized under said license or licenses, and has made application to the National Harrow Company for written consent to purchase the said license or licenses, and to exercise all rights and privileges thereunder.

And whereas, the board of directors of the National Harrow Company has authorized and by these presents authorizes the said Edwin H. Risley to purchase and acquire, exercise and enjoy all rights and privileges, benefits and immunities under all of the licenses which he may purchase now or hereafter granted by this company and has empowered the president under the corporate signature and seal to execute authority accordingly:

Now, therefore, it is agreed by and between the National Harrow

Company of New Jersey, party of the first part, and Edwin H. Risley of Utica, N. Y., party of the second part, as follows:

In consideration of one dollar each to the other paid the receipt of which is hereby acknowledged and of the mutual agreement herein contained, it is agreed as follows:

First. The National Harrow Company, its successors and assigns, hereby authorizes and empowers each and every of its licensees, now or hereafter granted, to sell, assign, transfer, and set over to Edwin H. Risley all rights, privileges, benefits and immunities secured under the license or licenses of the National Harrow Company, and that said license or licenses when so assigned, transferred and delivered, shall be and remain operative and in full force and effect to the same extent as they would have been had the assignment and transfer not been made, and the National Harrow Company hereby consents to the said transfer; and that the said Edwin H.
531 Risley may conduct, in such place or places as he may see fit, the harrow business authorized and sanctioned by the terms of said several license or licenses according to their true intent and meaning in all particulars, except as hereby modified; and the National Harrow Company hereby consents that the said Edwin H. Risley may conduct the business authorized under said licenses in such place or places as he may see fit, notwithstanding any condition in said licenses to the contrary.

Second. The said Edwin H. Risley agrees on his part to perform the conditions embraced in all of the licenses purchased by him to the same extent as he would if he had been made licensee in the various licenses, except as modified in this agreement.

Third. This agreement is to apply to the parties, their successors, heirs, representatives and assigns.

Witness the signature of the National Harrow Company and its corporate seal and the hand and seal of Edwin H. Risley, this 19th day of December, one thousand eight hundred and ninety-two.

THE NATIONAL HARROW CO.,
By CHAS. H. CHILDS, *Pres.*
EDWIN H. RISLEY. [L. S.]

ONEIDA COUNTY, *ss:*

On this 19th day of December, 1892, personally appeared before me Charles H. Childs, who being by me duly sworn, says that he is president of the National Harrow Company and affixed the corporate seal and signature to the foregoing contract, by virtue of the resolution of the board of directors; and being personally known to me to be the same person described in and who executed the foregoing instrument and duly acknowledged the execution thereof.

CHAS. A. LONG,
Notary Public, Oneida Co., N. Y.

532 WITNESS: Under the resolution and terms of the contract, I purchased and took assignments from seventeen of the persons, firms and corporations who held licenses of this plaintiff.

Mr. RISLEY:

Q. After the adoption of the resolution by the board of directors, did you purchase any of the licenses and rights granted under the licenses of the plaintiff, from the parties who then held, if so, state who and the amount paid?

Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and reopening plaintiff's case.
Objection overruled. Exception.

A. I did. I entered into contracts, which gave me the option of purchasing all of the then outstanding licenses of the plaintiff. I acted on and accepted or acquired, by purchase the licenses granted to sixteen or seventeen persons, firms and corporations and paid for these rights, so purchased, more than two hundred thousand dollars, partly in cash and partly in the preferred stock of the Standard Harrow Company, to whom I sold those rights.

On the next day after the adoption of the resolution by the board of directors, I procured from the defendant, an option to purchase their float spring tooth harrow business, licenses and stock in the National Harrow Company. I have the paper now here, signed by E. Bement & Sons by Arthur O. Bement, president, and *and* Edwin H. Risley.

I now offer the paper in evidence.

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and reopening plaintiff's case.
Objection overruled. Exception.
Paper received and marked "Pl'ff's Ex. 138, Feb. 16, 1895, S. E. J."

533 Mr. RISLEY: This option was extended from time to time until the 4th day of December, 1892, when I received from the defendant the following letter (I offer the letter in evidence):

Mr. COOKINHAM: I object to it the same as above.
Same ruling, exception.
Letter marked Pl'ff's Ex. 139.

Mr. RISLEY: The letter is on the lithographed letter-head of E. Bement & Sons, dated "December 4, 1892, Edwin H. Risley, Utica, N. Y. Dear Sir: We hereby agree to sell to you as per option given you, our spring-tooth harrow business, and agree that the price instead of being $50,000, shall be $45,000, providing you send us on account $500 April 25, and pay the balance in cash June 1, 1893. If you only pay one-fourth cash June 1, 1893, than you shall pay for the option $46,250, and if you do not pay $500 April 25, then the option shall call for $50,000, as per our original to you. Yours truly, E. Bement & Sons, A. O. Bement, president."

Mr. RISLEY: I sent Mr. Bement a check for $500 prior to April 25.

Mr. COOKINHAM: I object to this as incompetent, immaterial and a reopening of plaintiff's case.
Objection overruled, exception.

Mr. RISLEY: The check was paid in due course of business. On the 8th of April, 1893, the option was extended to May 1, 1893, subject to notice by mail to be given of a desire to shorten time. I have the paper here which was signed by E. Bement & Sons, by Arthur O. Bement and the North-Molitor Manufacturing Company by Arthur O. Bement, director.

I now offer the letter in evidence.

It is on lithographed letter-head of Simon Borg & Company, 36 Nassau street, New York.

"NEW YORK, *April* 8, 1893.

We hereby agree to extend the option contracts made with Edwin H. Risley to purchase our spring tooth harrow business until
534 ten days after we notify him in writing that he must take and exercise his option, and if he fails to comply with the option contract within ten days after notice in writing as aforesaid, then they shall be terminated, the notice not to be given prior to May first, 1893, but in case the options are to expire June first, it shall be legal notice on our part to mail at Lansing a registered letter, postpaid, addressed to Edwin H. Risley, Utica, N. Y.

Yours, etc.,

E. BEMENT & SONS,
By A. O. BEMENT.
THE NORTH-MOLITOR MANUFACTURING COMPANY,
By A. O. BEMENT, *Director.*"

On or about the 13th day of May, 1893, I received a letter from E. Bement & Sons, relating to the matter which I now have in hand.

Letter offered in evidence.

Mr. RISLEY: The letter reads as follows: It is on lithographed letter-head of E. Bement & Sons, dated May 12, 1893.

Edwin H. Risley, Utica, N. Y.

DEAR SIR: This is to notify you that the option given you on E. Bement & Sons and the North-Molitor Manufacturing Company, in the National Harrow Company's stock and business is to be terminated ten days from this date, as per our agreement.

I should judge from the present financial outlook that you would probably have a pretty hard time to secure the necessary stock. We have two "busted" banks in this neighborhood, and consequently people are not hunting around very anxiously for a place to invest their money.

Yours truly,

E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

535 This option was not renewed after the giving of this notice.

Cross-examination:

I, or the Standard Harrow Company paid in cash to the licensees, I paid out all told, something like between $40,000 and $50,000 in cash.

The papers that I delivered to Mr. Howard, which I have stated

I obtained from the defendant, were like the papers that he held, that had been signed by the other licensees in the main. I understood that those papers were all destroyed.

Q. These are the ones that were finally delivered to Norris and Brinkerhoff for destruction?

A. I am not quite clear whether those papers were in my possession, all of them, so I delivered them to Norris, or whether they had been delivered to Mr. Norris at an earlier date. This much I do remember, that all the original papers that I had in my possession were delivered to Mr. Norris on order of the company, and from which time, I have never seen them.

Mr. RISLEY: I want to offer in evidence the paper marked in Lansing for identification, and have it considered as in evidence.

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant and that the paper is not proven.

Objection overruled. Exception.

Paper received and marked Plaintiff'- Exhibit 140 and is as follows:

"Memorandum of an agreement made and entered into this seventeenth day of November, 1891, by and between the National Harrow Company of New Jersey, and E. Bement & Sons of Lansing, Mich.

Witnesseth, that for and in consideration of the sum of one dollar to each of the parties in hand paid by the other the receipt of
536 which is hereby acknowledged and of other good, valid and sufficient considerations hereinafter set forth the parties agree as follows:

The said E. Bement & Sons agree to proceed without unnecessary delay and hereafter at all times use due and reasonable diligence and effort at their proper cost and expense in obtaining the rights Chas. La Dow has in spring tooth harrow patents and any pending applications he may have in the Patent Office, and assign all interests they may receive if any in said patents or applications and any in which they may be interested to the said National Harrow Company at their request. And said E. Bement & Sons further agree to assign to said National Harrow Company upon their request, any and all interests in patents they may have or obtain or be interested in so far as they relate to spring tooth harrows, and assign the title to said patents.

In consideration of the above undertakings on the part of said E. Bement & Sons, the National Harrow Company will upon request of said E. Bement & Sons (in writing) issue to their order, stock of said company to the extent of sixteen thousand dollars (16,000) as full consideration for the undertakings to be performed by said E. Bement & Sons.

Witness the signature of the parties the day and year first above written.

THE NATIONAL HARROW CO.,
By W. M. BRINKERHOFF, *Sec'y.*
E. BEMENT & SONS,
By A. O. BEMENT, *Pres.*"

Mr. CHARLES H. CHILDS recalled and cross-examined:

I don't remember whether or not I ever saw an advertisement of a lever harrow in which the word "float" was applied to it.

(Paper shown witness.)

537 This appears to be the advertisement of the Standard Harrow Company in "The Implement Age."

Q. Is the lever harrow in that paper advertised as a lever float spring tooth harrow?

A. The word "float" does not seem to be used.

That paper is devoted very largely to advertising agricultural implements.

Q. Is that an advertisement of the Standard Harrow Company in another paper of the same character?

(Paper shown witness.)

A. It seems to be in "The Farmers' News."

The word "float" is not used in that advertisement in connection with the lever spring tooth harrow.

Am not especially familiar with the advertisements in those papers of the manufacturers of spring tooth harrows.

I don't think we subscribe for those papers but they are often sent to us by the publishers.

Am not able to state whether or not any licensee of the National Harrow Company uses the word "float" in connection with its lever harrow to describe the harrow. Am unable to say whether any of the licensees of the plaintiff in their advertisements draws a distinction between a lever spring tooth harrow and a float spring tooth harrow?

I think I have seen advertisements of other licensees of the National Harrow Company than the Standard Harrow Company. That is one.

(Paper shown witness.)

The Buffalo Pitts Implement Company of Buffalo, I think. That is one of the licensees of the plaintiff. The paper is the "Implement Age" of March, 1895.

The advertisement so far as spring tooth harrows are concerned reads as follows:

"Buffalo Pitts lever spring tooth, float and horseshoe frame harrows."

538 I presume I have seen Hench & Dromgold's advertisement but I don't remember at this time.

(Paper shown witness.)

That is Hench & Dromgold's advertisement in that paper of spring tooth harrows. The word "float" is not used in connection with a lever harrow to describe it. I presume I have seen advertisements of the Syracuse Chilled Plow Company, but I don't remember it at this time. Don't know whether or not they use the

word "float" in advertising their lever spring tooth harrows. I am not able at this time to state one manufacturer or dealer in spring tooth harrows that uses the word "float" in describing a lever spring tooth harrow.

Redirect examination:

Q. Referring to the advertisement of Hench & Dromgold which was shown you, under what words do they advertise the spring tooth harrow; which was illustrated in the cut shown you in the cross-examination?

A. A new departure Hench & Dromgold improved lever and wheel spring tooth harrows with seat attached for either riding or walking.

Q. Now when was it that they started, if at all, to put such a harrow on the market?

Mr. COOKINHAM: I object to that as incompetent, immaterial and not in reply to anything that I have asked the witness.

Objection overruled, exception.

A. I never heard of this harrow being advertised or sold until within the past few months.

Mr. COOKINHAM: I want to examine the witness in regard to this paper.

Q. Do you know anything about the paper now handed you?

A. I do not.

539 Q. You don't know where it was printed or who printed it?

A. I don't.

Q. You don't know what has been done with it or one like it?

A. I don't.

Mr. RISLEY:

Q. What does the paper I hand you purport to be?

Mr. COOKINHAM: I object to it as incompetent and immaterial.

Objection overruled, exception.

A. It is a printed circular issued by Heebner & Sons of Lansdale, Pennsylvania, advertising a spring tooth harrow. There is a cut of the harrow in the advertisement. It shows a spring tooth harrow with lever attachments.

Q. Under what name is the harrow advertised in that cut?

Mr. COOKINHAM: I object to that as incompetent, immaterial and irrelevant; no foundation laid for this answer.

Objection overruled, exception.

A. The "Heebner lever float harrow."

Mr. RISLEY:

Q. Please look Mr. Childs at Exhibit 125, Jan. 23, 1895, W. A. M., and state whether the harrow illustrated in that cut, is the lever

harrow in which Hench & Dromgold were licensed by the plaintiff to build?

Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and reopening plaintiff's case.

Objection overruled, exception.

A. I think it is.

Mr. RISLEY:

Q. The non-lever float harrow which they were licensed to
540 build, will you state how that differed in construction from the one shown in that cut to which the previous question referred?

Same objection, ruling, exception.

A. I think it was the same general construction of harrow with the exception of the lever attachments for adjusting teeth.

Mr. RISLEY: I now offer in evidence an injunction order granted by the circuit court of the United States in and for the eastern district of Pennsylvania, wherein The National Harrow Company was plaintiff, and Samuel N. Hench and Walker A. Dromgold were defendants, granted on the 20th day of October, 1894, under the official seal of the court and certificate of the clerk.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant, reopening plaintiff's case and not properly proved.

Objection overruled, exception.

Order received and marked Plaintiff's Ex. 141, M'ch 11, 1895.

U. S. Circuit Court, Eastern District of Pennsylvania.

THE NATIONAL HARROW COMPANY
against
SAMUEL N. HENCH and WALKER A. DROMGOLD.

STATE OF PENNSYLVANIA, *County of York*, } *ss:*

Lemon Love of the county of York, in the State of Pennsylvania, being duly sworn, says that he is above the age of twenty-one years.

That on the 26th day of October, 1894, he personally served the annexed original injunction, issued out of the circuit court of the United States, in the above-entitled action, upon Samuel N.
541 Hench and Walker A. Dromgold, at the city of York, in the State of Pennsylvania, by delivering to and leaving with each of them a copy of said injunction order and, at the same time, exhibiting to them the original injunction order, together with the seal of the court and the signature of the clerk.

That I personally know the persons so served to be the said Samuel N. Hench and Walker A. Dromgold mentioned in said injunction order.

LEMON LOVE.

Subscribed and sworn to before me this 26th day of October, 1894.

[L. S.] WM. F. RAMSEY,
Notary Public, York County, Pa.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } ss:

The President of the United States to Samuel N. Hench and Walker A. Dromgold, doing business as Hench & Dromgold:

Whereas, the National Harrow Company, lately exhibited its bill of complaint in the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, against you the said defendants, praying to be relieved touching the matters therein complained of and especially that you, Samuel N. Hench and Walker A. Dromgold, doing business, etc., and all acting under you and each of you may be enjoined and restrained from doing or suffering to be done any act or thing in violation of the terms of the license contract and the rights of the said complainant in the premises, in the bill mentioned, in any way or manner contrary to law or equity: We therefore in consideration thereof and also of the particular matters in the said bill set forth, do strictly command and enjoin you, the said Samuel N. Hench and Walker A. Dromgold, doing business, etc., your servants, workmen and agents, and
542 all others acting under or with you, and each and every of you, that from henceforth you do absolutely and entirely desist and refrain from the further violating in any manner or way, directly or indirectly, or doing or suffering to be done, any act or thing in violation of the terms of the license contracts attached to the bill of complaint in this action, and also that the complainant, The National Harrow Company be enjoined and restrained from doing, or suffering to be done, any act or thing in violation of the terms of the license contracts referred to in the said bill of complaint, and in the affidavits of the complainant thereto annexed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this
[SEAL.] twentieth day of October in the year of our Lord one thousand eight hundred and ninety-four and in the one hundred and nineteenth year of the Independence of the said United States.

SAMUEL BELL,
Clerk Circuit Court United States,
Eastern District of Pennsylvania.

(Endorsed:) Circuit court, April session, 1894. National Harrow Co. *vs.* Samuel N. Hench *et al.* Injunction. Due and personal service of the within injunction is admitted Oct. 22, 1894, at Utica, N. Y. The National Harrow Co., by Edwin H. Risley, pres. Risley, Robinson & Love, solicitors for complainants.

Mr. RISLEY:

Q. Is the lever harrow of Hench & Dromgold shown in the cut

of the newspaper advertisement, a harrow which the plaintiff has ever licensed Hench & Dromgold to sell?

543 Mr. COOKINHAM: I object to that as incompetent, immaterial, irrelevant and reopening plaintiff's case.

Objection overruled, exception.

A. It is not.

I think Reed & Co. began the manufacture of spring tooth harrows about '77 or '78. I think G. B. Olin & Co. was next. Lawrence & Chapin of Kalamazoo, Chase, Taylor & Co. I think next. Both of these firms were in the business when Childs & Co. began the manufacture of harrows in '86.

Those who succeeded in point of time Childs & Co. in the trade were the Eureka Mower Company, A. W. Stevens & Son, Hench & Dromgold, Buffalo Pitts, Lull & Co., E. Bement & Sons, Clipper Chilled Plow Co., Syracuse Chilled Plow Co., Walker Manufacturing Co., Herndeen Manufacturing Co., McSherry Manufacturing — Farmers' Friend Manufacturing Co., D. B. Smith Company, Childs & Jones, Albion Manufacturing Co., and there were several others, that I cannot at this time think of.

Recross-examination:

I do not know anything about how Hench & Dromgold's suit was settled up of my own knowledge.

I do not know anything about this Heebner lever harrow, or lever float spring tooth harrow mentioned in the circular shown me by the counsel for the plaintiff.

I think I have heard of it before today; I don't think I have ever seen the harrow, I don't remember.

I think that some effort was made by these people to market their harrow, but for the last year or so, I have not heard anything about their being sold. They have not had any connection with the National Harrow Company in the way of any license.

544 Redirect examination:

Q. Mr. Childs, was the stock of the National Harrow Company of New York, issued to parties on the award of the arbitrators for the amount which their awards called for?

A. I think it was, unless it may have been in the case of Bement & Sons; they declined to accept the finding of the arbitrators and on that account there was some delay in issuing stock to this company, and I am under the impression that there was no stock of the New York company issued, but that the stock to Bement & Sons was issued by the New Jersey corporation. And after that was done, the stock of the New York company was surrendered and the stock of the plaintiff issued for an equal amount to take its place to all of the stockholders?

Mr. RISLEY: I want to offer in evidence a thing I overlooked, the action of the board of directors of the New York company, appear-

ing in the minute book of company on pages 50, 51, under date of September 8th and 9th, voting to transfer to the New Jersey company, the stock that was represented at the meeting. It is pages 50, 51 and a little on 52, of the minute book of the New York corporation.

Received in evidence.

"UTICA, N. Y., *Sep.* 8, 1891.

Directors' meeting called to order by the president at 3 o'clock p. m. at No. 20 Mann building, the following directors upon roll-call answered to their names: Lawrence, Reed, Henry, Stevens, C. H. Childs, O. J. Childs and Norris.

There not being a quorum present, upon motion of Mr. Stevens, the meeting was adjourned to same place at 9 o'clock a. m., Sept. 9th, 1891.

545 UTICA, N. Y., *Sept. 9th*, 1891.

Meeting called to order by the president at 9 o'clock a. m., this day. The following-named directors were present and answered to their names upon calling the roll: Messrs. Reed, Henry, Lawrence, Stevens, Manning, C. H. Childs, O. J. Childs, Sweet and Norris (9). Absent: Williams, Everest, Dromgold and Bement (4).

The minutes of all preceding meetings of the board and executive committee were read and upon motion approved. Mr. Stevens offered the following resolution.

'Whereas, This company did on the fifth day of August, 1891, accept the proposal of the National Harrow Company of New Jersey to sell all its patents, rights and property to said company and to receive therefor $425,000, in full paid up stock in such company, and

Whereas, since said day this company has acquired all the patents and rights thereunder formerly belonging to the "Syracuse Chilled Plow Company."

Therefore resolved, that this company do propose to sell all its patents, and interests in patents obtained from said Syracuse Chilled Plow Co., and also all money, merchandise, licenses, agreements, contracts and property of every name and nature except $1,000, in cash, and also all claims and rights of action owned by this company, to said The National Harrow Co. of New Jersey, for the sum of $30,000, to be paid in full paid up stock of said The National Harrow Co. Said New Jersey company to assume all outstanding debts and obligations and contracts of this company. The president and treasurer of this company are hereby authorized to execute all papers necessary to carry the agreements between said companies into effect.' By the unanimous vote of the board this resolution was adopted. The officers reported that they had carried out the foregoing resolutions in regard to the sale of all the patents and
546 interest in patents and applications for patents pending upon spring tooth harrows or any part thereof and all money, merchandise, licenses, agreements, contracts and property of every name and nature except $1,000 in cash, and also all claim and rights

of action owned by the company for the sum of $455,000, in full paid up stock of the National Harrow Company of Jersey City, N. J. Said company to assume all outstanding debts, obligations contracts and licenses of this company. And that they had received therefor a certificate for full-paid capital stock in said company for $455,000. It was then decided that the said stock be divided among the stockholders of this company as follows:

Names.	Residence.	Shares.
Heber C. Reed	Kalamazoo, Mich	1
D. C. & H. C. Reed	Kalamazoo, Mich	536
Charles H. Childs	Utica, N. Y	1
Everett F. Crumb	Utica, N. Y	1
Chas. H. Childs & Co	Utica, N. Y	533
A. W. Stevens & Son	Auburn, N. Y	533
Leroy W. Stevens	Auburn, N. Y	1
Taylor & Henry	Kalamazoo, Mich	458
Frank J. Henry	Kalamazoo, Mich	1
William S. Lawrence	Kalamazoo, Mich	460
Edward Norris	Utica, N. Y	338
Hench & Dromgold	York, Pa	319
Walker A. Dromgold	York, Pa	1
Arthur O. Bement	Lansing, Mich	292
D. B. Smith & Co	Utica, N. Y	125
V. P. Van Horne	Dayton, O	103
Geo. Sweet	Dansville, N. Y	50
Geo. Sweet & Co	Dansville, N. Y	50
Albert Sweet	Dansville, N. Y	1
W. V. Walker	Moravia, N. Y	99
L. C. Lull & Co	Kalamazoo, Mich	98
Edward W. Herndeen	Geneva, N. Y	51
547 Malcolm B. Williams	Kalamazoo, Mich	51
		4,103
D. O. Everest & Co	Pine Grove Mills, Mich	50
D. O. Everest	Pine Grove Mills, Mich	1
Orlando J. Childs	Utica, N. Y	51
D. E. McSherry	Dayton, Ohio	45
James Manning	Syracuse, N. Y	300
		4,550

The certificate for 4,550 shares of stock was assigned to the above-named persons, and surrendered to the National Harrow Co. of Jersey City, N. J., with direction to make new certificate to above-named persons as above stated."

Mr. RISLEY: I offer in evidence from the same book pages 39–40, the action of the board of trustees. It is on the subject of the delivery of these license contracts including those in suit.

The same received.

"UTICA, N. Y., *June* 16, 1891.

Pursuant to call June 5, there was a meeting of the licensees of the National Harrow Company held at Bagg's hotel, Utica, N. Y., at 2 o'clock p. m. this day.

Present: James Manning for Syracuse Chilled Plow Co.; W. V. Walker, Walker Mfg. Co.; Albert Sweet, Geo. W. Sweet & Co.; L. C. Lull, L. C. Lull & Co.; W. A. Dromgold, Hench & Dromgold; O. J. Childs, Childs & Jones; Arthur O. Bement, C. A. Gower, E. Bement & Sons, Heber C. Reed, D. C. and H. C. Reed & Co.; L. W. Stevens, A. W. Stevens & Son; De Wane B. Smith, Chas. H. Poole, De Wane B. Smith & Co.; V. P. Van Horne, Farmers' Friend Mfg. Co.; W. S. Lawrence, F. J. Henry, Taylor & Henry; Chas. H. Childs, Chas. H. Childs & Co.; E. W. Herndeen, Herendeen Mfg. Co.; E. Norris, Eureka Mower Co.

548 Absent: McSherry Manufacturing Co., Williams Manufacturing Co., D. O. Everest & Co.

The meeting was called to order by Mr. Chas. H. Childs, chairman, who read the call for the meeting dated June 5th and stated its object viz.: that the new papers including the licenses had been signed by eighteen firms, persons or corporations out of the total number of 19, and that the Syracuse Chilled Plow Co. only had not signed them. Mr. Manning of the Syracuse Chilled Plow Co. stated their objections to signing the papers and declined to do so.

A meeting of the trustees of the company pursuant to call of June 5th, was then held and called to order by the president.

Upon roll-call, all of the trustees of the company were present, excepting James Manning, M. B. Williams and D. O. Everest.

The chairman stated that the position of the Syracuse Chilled Plow Co. in not signing the new papers, rendered it necessary for the board of trustees to act as to the disposition of the papers. The last clause of the escrow agreement, which gives to the board of trustees power to go on with the papers, providing any of the persons, firms and corporations shall neglect or refuse to sign, was also read by the president.

Mr. Reed offered the following resolution:

Whereas it is provided in the escrow agreement of the date of April A. D. 1891, that in case one or more of the persons, firms or corporations named in said escrow agreement shall neglect or refuse to sign, execute and deliver the respective contracts and licenses therein mentioned on or before the first day of June, A. D., 1891.

And whereas the Syracuse Chilled Plow Co. have heretofore neglected and refused and still neglects and refuses to sign, exe-
549 cute and deliver the said license contract and agreement presented to them to said Edward Norris as therein provided, and as all other persons, firms and corporations therein named, having signed, executed and delivered to said E. Norris as therein provided said license, contract etc.

Now therefore, resolved that said Edward Norris be and he is hereby instructed to deliver to the National Harrow Co. and to each of the persons, firms and corporations mentioned and named in said

escrow agreement, who have executed and delivered to him the same, the license, contract and papers mentioned in said escrow agreement, and that the same are hereby declared operative and that said National Harrow Co. proceed without said Syracuse Chilled Plow Co.

Seconded by Mr. Dromgold, unanimously carried by the following vote upon roll-call:

C. H. Childs, Heber C. Reed, Frank J. Henry, Orlando J. Childs, Arthur O. Bement, Albert Sweet, William S. Lawrence, Le Roy W. Stevens, W. A. Dromgold, Edward Norris."

Mr. RISLEY: I offer in evidence four separate assignments of letters patent from the defendant to the National Harrow Company of New York, dated June 18th, 1891, each of them dated the same day.

Received and marked Plaintiff's Ex. 142, Plaintiff's Ex. 143, Plaintiff's Ex. 144 and Plaintiff's Ex. 145.

The following is a copy of Ex. 142 the other exhibits being the same in form.

(2–178.)

Received for record Oct. 12, 1891, and recorded in Liber G. 45, page 39 of transfers of patents.

In testimony whereof I have caused the seal of the
[SEAL.] Patent Office to be hereunto affixed.

W. E. SIMONDS,
Commissioner of Patents.

550 Whereas, E. Bement & Sons (corporation) of Lansing, in the county of —— and State of Michigan, has or claims some interest in or rights under certain letters patent of the United States granted to Charles La Dow and another for an improvement in harrows, on the 25th day of April, 1882. Reissue No. 10092.

And whereas, the National Harrow Company, a corporation doing business at Utica, in the county of Oneida and State of New York, is desirous of acquiring all of the right, title and interest in, under or to said letters patent reissue No. 10092, as fully and as completely as it now owns or holds the same, and all rights of contract damages, royalties, rights of action and benefits accrued or accruing under the same, as fully and as completely as the same is now owned, held and enjoyed by it.

Now, therefore, in consideration of one dollar to it in hand paid by the National Harrow Company, the receipt whereof is hereby acknowledged, and in consideration of the benefits and advantages to be hereafter received, it hereby sells, assigns and sets over, and by these presents do- hereby sell, assign and set over to the National Harrow Company its successors and assigns, all right, title and interest in, to or under said letters patent No. 10092, and all benefits and advantages accrued and to accrue under the same as completely and as fully as it can transfer the same, together with all rights of action accrued or to accrue under the same, with all damages, royal-

ties or other benefits accrued or to accrue, as fully and completely as the same can be transferred by it to the National Harrow Company, to have and to hold the same to its successors and assigns forever; and it covenants and agrees to and with the National Harrow Company its successors and assigns that it will not hereafter
551 contest the validity, novelty or infringement of said patent No. 10092 or controvert any right hereby transferred, or aid others to contest or controvert either or any right hereby transferred to the National Harrow Company.

Witness its hand and seal this 18th day of June, 1891.

E. BEMENT & SONS,
By A. O. BEMENT, *Pt.* [L. S.]
C. A. GOWER,
Vice-Pres't. [L. S.]

In the presence of
EDWIN H. RISLEY.

(Endorsed:) Reissue 68311, No. 10092. Assignment of patent. E. Bement & Sons to Pl'ff's Ex. 142, Mich. 11195. The National Harrow Co. Chas. La Dow and another patentee. Dated June 18, 1891. Recorded in the U. S. Patent Office —— —, 1890. Risley & Perry, attorneys, office and post-office address, Herald building, Utica, N. Y.

That on the 14th of September, 1891, Mr. Norris mailed to the defendant, certificate 28, in the plaintiff for two hundred and ninety-two shares of its capital stock, the certificate being issued to Arthur O. Bement for E. Bement & Sons. Exhibit "A" marked for identification, dated June 25, 1895, now received in evidence.

Duplicate.

Taken by Forster, Andover, N. Y., Jan. 20, 1894.

E. Bement & Sons, Lansing, Mich.:

Please make and ship me on or about April 15th, the following goods, via Erie R. R. on the following terms, note or acceptance due four months, June 1st, 10%, June 10, less freight.

It is understood and agreed that this order contains all
552 terms and conditions under which it is taken, and that no verbal agreements with agents are binding; and that this order is not subject to countermand after being accepted by E. Bement & Sons. It is also understood that no charges will be allowed for broken, imperfect or defective material, but that E. Bement & Sons will furnish new parts free at factory for such defective or imperfect material, when held subject to their inspection and order.

This order does not bind E. Bement & Sons until it is formally accepted.

No.	Article.	Price.
25.	17 T. lever Ajax harrows	$14 50

There is to be a rebate of $2.50 on each of the above harrows, and all others bought during the season of 1894, payable at the time of settlement.

The above subject to countermand up to March 10.

EDW'D J. ATWOOD.

(Ex. "A" Jan. 5, 1895.)
(For identification.)

Mr. COOKINHAM: I object to it. Not proven.

Objection overruled. Exception.

Mr. RISLEY: Plaintiff offers in evidence the bond of the defendant given to the New York company, indemnifying them against paying royalties on the La Dow license, executed and delivered at the same time the papers in suit were delivered.

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Paper marked "Pl'ff's Ex. 146, M'ch 11, '95, S. E. J."

Whereas, Messrs. E. Bement & Sons, a corporation organized and doing business at Lansing, Mich., have procured a license from Charles La Dow to manufacture and market their steel frame harrows under any and all patents which the said Charles La Dow has or may procure, applicable to such construction. The first of
553 said papers dated the 22d, of March, 1889, and whereas the said E. Bement & Sons are desirous of assigning the said license and all rights and privileges under the same to the National Harrow Co., upon the following terms and conditions:

Now, therefore, E. Bement & Sons, for the consideration of one dollar to it paid by the National Harrow Co. the receipt whereof is hereby acknowledged, the said E. Bement & Sons hereby sell, assign and transfer and set over to the National Harrow Co., its successors or assigns, all right, title and interest in and to and under said license from Charles La Dow to have and to hold the same to its successors or assigns forever, providing always that nothing herein contained shall obligate the National Harrow Co. to assume or pay any royalties now due or which may hereafter accrue, under said license to the said Charles La Dow. And for value and in consideration of the premises the said E. Bement & Sons hereby covenant and agree that they will save the National Harrow Co., its successors or assigns of and from all claim to royalty or damages on account thereof, and to bear the National Harrow Co. harmless of and from any claim arising under the same.

The license hereby assigned secures the right to the use of the following patents: No. 441,367, No. 450,984 and 451,422 with other patents granted Charles La Dow.

Witness the signature of E. Bement & Sons this 17th day of June, 1891.

E. BEMENT & SONS,
By A. O. BEMENT, *Pres.*
C. A. GOWER, *Vice-Pres.*

Witness:
EDWIN H. RISLEY.

Mr. RISLEY: I offer in evidence section 55 of the act of the legislature of the State of New Jersey approved April 7, 1875.

554 The title of the statute from which I read is as follows: "The general law of the State of New Jersey concerning corporations, approved April 7, 1875, together with acts amendatory, supplementary or relating thereto, in force July 4, 1891, compiled under the direction of the secretary of state. (Then follows the coat of arms of the State of New Jersey.)

Trenton, N. J. Naar, Day and Naar, book and job printers, 1891.

(The section reads as follows:)

55. Property may be taken for stock:

The directors of any company incorporated under this act may purchase mines, manufactories, or other property necessary for their business or the stock of any company or companies owning mining, manufacturing or producing materials or other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor and the stock so issued shall be declared and be taken to be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments under any of the provisions of this act; and said stock shall have legibly stamped upon the face thereof, "Issued for property purchased," and in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.

I also offer in evidence the resolution of the board of directors of this plaintiff, purchasing the patents and property of the New York company, specified in the resolution, it is on pages 14 and 15 of the Book of Minutes of the plaintiff.

(Copy of resolutions.)

W. H. Parker offered the following resolution:

"Whereas this company did propose to purchase of the

555 National Harrow Company" of Utica, N. Y., all its patents and interest in patent and rights thereunder, owned by said company, and pay therefor $425,000, in full paid-up stock of this company, and

Whereas, said "The National Harrow Company" of Utica, N. Y., did accept said proposal, and

Whereas, since said acceptance said "The National Harrow Company" of Utica, N. Y., has acquired all the patents, interest in patents and rights thereunder of "the Syracuse Chilled Plow Company," and

Whereas, said company has proposed to this company to sell it, all said patents, interest in patents and rights thereunder formerly belonging to said "The Syracuse Chilled Plow Company" and also all money, merchandise, licenses, agreements, contracts and property of every name and nature except $1,000, in cash, and all claims and rights of action owned by said "The National Harrow Company" of Utica, N. Y., and to accept in payment therefor $30,000, in full paid-up stock of this company, this company to assume all

outstanding debts, obligations and contracts of that company. Therefore

Resolved, That such proposal be accepted.

It being understood and agreed that the total amount paid to "The National Harrow Company" of Utica, N. Y., for all its patents and *interest in patents and all applications for patents* now pending, applicable in any way to "spring tooth harrows" or parts thereof, and all money, merchandise, licenses, agreements, contracts and property of every name and nature, except $1,000 in cash in $455,000.

It is further resolved that the president and treasurer of this company be and they are hereby authorized to execute all papers necessary to carry out the agreement between said companies.

On motion the resolution was adopted.

Plaintiff rests.

556 Mr. COOKINHAM: I want to put in two certificates of incorporation that of the Eureka Mower Company and that of the defendant.

The same are considered in evidence.

It is conceded that the cross-examination in the deposition taken in Michigan *are* considered in evidence by the plaintiff.

It is agreed that each side may draw the amendments desired to the pleadings and serve on the other party by Thursday morning.

Any other exhibit not printed or not printed in full may be furnished to the court if the court shall so desire.

EXHIBITS.

DEFENDANT'S EXHIBIT "56."

Articles of incorporation of plaintiff printed at page 244.

Mr. Risley's receipt for papers of the Clipper Chilled Plow Company of Elmira, not printed separately as it is the same as No. 4 attached to the answer and printed in the judgment-roll at page 76.

DEFENDANT'S EXHIBIT "129."

Certificate of *information* of the Walker Manufacturing Company. Statement in place of certificate. Said company has capital stock of ten thousand dollars and it was organized January 3, 1890, for fifty years, for the "purpose of carrying on and conducting the manufacture and sale of sleighs, wagons and agricultural machinery, tools and implements."

DEFENDANT'S EXHIBIT "130."

Certificate of incorporation of the Pitts Agricultural Works of Buffalo, N. Y., not printed. In place thereof the following:

557 Company organized November 2, 1877, for twenty years, capital stock three hundred thousand dollars, object "the manufacture and sale of agricultural implements."

DEFENDANT'S EXHIBIT "131."

Certificate of incorporation of the Syracuse Chilled Plow Company. Not printed, but the following in place thereof: "Company organized January 23, 1879, for 20 years, capital stock one hundred and fifty thousand dollars, object, 'the manufacture of plows and parts thereof.'"

DEFENDANT'S EXHIBIT "132."

Certificate of incorporation of the Herndeen Manufacturing Company, of Geneva, N. Y., not printed, but the following in place thereof: "Company organized March 7, 1888, for fifty years, capital stock one hundred thousand dollars, object, 'the manufacture and sale of steam heaters, radiators, and all other things pertaining thereto or connected therewith, and the manufacture and sale of agricultural implements and other machinery, and all foundry and machine-shop work and the transaction of such business connected therewith or necessary or incident thereto as are authorized by the general act under which said corporation is founded.'"

DEFENDANT'S EXHIBIT "133."

Certificate of incorporation of Eureka Mower Company of Utica, N. Y., not printed and in place thereof the following: Company organized February 14, 1884, for fifty years, capital stock $250,000, object, "The manufacture and sale of mowing machines and other agricultural implements."

DEFENDANT'S EXHIBIT.

Certificates of incorporation and increase of stock of defendant.

558 STATE OF MICHIGAN, } ss:
Office of the Secretary of State, }

I, Washington Gardner, secretary of state of the State of Michigan, do hereby certify, that I have compared the annexed copy of articles of association of the "E. Bement & Sons," with the record of the original, made in this office, Oct. 15, 1886, and that it is a true and correct transcript therefrom, and of the whole of such record.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this fourteenth day of March, in the year of our Lord one thousand, eight hundred and ninety-five. [SEAL.]

WASHINGTON GARDNER,
Secretary of State.

Articles of Association of E. Bement & Sons.

We, the undersigned desiring to become incorporated under the provisions of act No. 232, of the Public Acts of 1885, entitled "An act

to revise the laws providing for the incorporation of all manufacturing companies (except such as are contemplated by act No. 42 of the Session Laws of 1867, which provides for the incorporation of persons or corporations engaged in the manufacture of salt), and mercantile companies or any union of the two, and to fix the duties and liabilities of such corporations," do hereby make, execute and adopt the following articles of association, to wit:

559 Article I.

The name assumed by this corporation and by which it shall be known in law is E. Bement & Sons.

Article II.

The purpose or purposes of this corporation are as follows: The manufacture of stoves, furnaces, ranges, hollow-ware, agricultural implements, bob-sleds and & *and* other wood, iron and steel goods, and the sale of the products so manufactured.

Article III.

The capital stock of the corporation hereby organized is the sum of two hundred thousand ($200,000) dollars, and the number of shares thereof is eight thousand (8,000).

Article IV.

The amount of said stock actually paid in at the date hereof, is the sum of one hundred and forty-six thousand nine hundred and fifty dollars, being about 73 per cent. of said capital stock.

Article V.

The operations of this corporation are to be carried on in the county of Ingham, State of Michigan, and the office for the transaction of business within the State of Michigan, shall be kept at the city of Lansing.

Article VI.

The term of existence of this corporation is fixed at thirty years from the date hereof.

In witness whereof, we, the parties hereby associating [SEAL.] for the purpose of giving legal effect to these articles, hereunto sign our names, our place of residence and the number of shares of stock held by each respectively.

Done at Lansing, Michigan, July 31, 1886.

560 Names.	Residence.	No. of shares.
Arthur O. Bement.....	Lansing, Mich.....	1,888
G. Willis Bement.....	" "	1,888
Clarence E. Bement.....	" "	944
Cornelius A Gower	" "	944
Augustus S. Bement.....	" "	214

STATE OF MICHIGAN, } ss:
County of Ingham, }

On this 31st day of July, 1886, before me a notary public in and for said county, personally appeared, Arthur O. Bement, G. Willis Bement, Clarence E. Bement, Cornelius A. Gower, and Augustus S. Bement, known to me to be the persons named in and who executed the foregoing instrument and severally acknowledged that they executed the same freely and for the intents and purposes therein mentioned.

[SEAL.] J. H. WARDWELL,
Notary Public, Ingham Co., Mich.

STATE OF MICHIGAN, } ss:
Office of Secretary of State, }

I, Washington Gardner, secretary of state of the State of Michigan, do hereby certify, that I have compared the annexed copy of a certificate of increase in the capital stock of the "E. Bement & Sons," with the record of the original, made in this office, Dec. 23, 1891, and that it is a true and correct transcript therefrom, and of the whole of such record.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the great seal of the State of Michigan, at Lansing, this fourteenth day of March, in the year of our Lord one thousand, eight hundred and ninety-five.

WASHINGTON GARDNER,
Secretary of State.

561 LANSING, MICH., *May* 23, 1889.

At a meeting of the stockholders of E. Bement & Sons, called to take into consideration increasing the capital stock of said corporation, the following resolution was adopted by a unanimous vote of the capital stock:

Resolved, That the capital stock of the corporation of E. Bement & Sons, be, and the same is hereby increased to three hundred thousand dollars, ($300,000.)

(Signed) A. O. BEMENT, *Pt.*
G. W. BEMENT,
C. A. GOWER,
[SEAL.] A. S. BEMENT,
CLARENCE E. BEMENT,
President and Entire Board of Directors.

UNITED STATES OF AMERICA, } ss:
State of Michigan, }

OFFICE OF THE SECRETARY OF STATE.

I, Washington Gardner, secretary of state of the State of Michigan, and being the officer who, under the constitution and laws of said State, is duly constituted the keeper of the records of articles of

incorporation of certain companies incorporated under the laws thereof, and the records of all papers relating to the creation of such incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as secretary of state, and found to be true and correct, of an amendment to the articles of incorporation of the "E. Bement & Sons," recorded in this office on the 6th day of April, A. D. 1894, in vol. 26, pages 459, 460 and 461 of the records of incorporation; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office in the United States.

562

In testimony whereof, I have hereunto attached my official signature and the great seal of the State of Michigan, at Lansing, this 23d day of February, A. D. 1895.

[SEAL.]

WASHINGTON GARDNER,
Secretary of State.

(Copy.)

Call for a Meeting of the Stockholders of E. Bement & Sons.

The undersigned, being all of the stockholders of E. Bement & Sons, a corporation organized and existing under the laws of this State, do hereby unite in calling a meeting of the stockholders at the office of said company, for the first day of September, 1893, at 2 o'clock p. m., to take into consideration:

1. The question of amending the articles of association, by increasing the capital stock of said corporation.

2. The question of issuing preferred shares for some part of such increase of the capital stock.

3. To adopt such by-laws as may be considered necessary and for the best interests of the shareholders. All other and further notice of such meeting is expressly waived.

Dated, Lansing, September 1, 1893.

A. O. BEMENT.
G. W. BEMENT.
A. F. MOLITOR.
[SEAL.] H. S. BARTHOLOMEW.
C. A. GOWER.
CLARENCE E. BEMENT.
ESTATE OF AUGUSTUS S. BEMENT,
By MARGARET L. BEMENT,
Administratrix,
By CLARENCE E. BEMENT, *Proxy.*

563

Minutes of Meeting.

At a meeting of the stockholders of E. Bement & Sons, held at the office of the company, pursuant to the foregoing call, there were present the following stockholders representing the number of shares set opposite their names:

A. O. Bement, 3,612 shares.
Clarence E. Bement, 1,805 shares.
G. W. Bement, 3,612 shares.
C. A. Gower, 1,805 shares.
A. F. Moliter, 586 shares.
H. S. Bartholomew, 231 shares.
A. S. Bement estate, 350 shares.

President A. O. Bement presided and H. S. Bartholomew acted as secretary.

The question of amending the articles of association so as to increase the capital stock and authorize the issuing of preferred shares for the whole or a part of such increase, being under discussion, Mr. H. S. Bartholomew offered the following resolution:

Resolved, That art. III, of the articles of association be amended so as to read as follows:

Art. III. The capital stock of E. Bement & Sons shall be the sum of five hundred thousand dollars ($500,000), of which one hundred and fifty thousand ($150,000), dollars shall be divided into fifteen thousand shares of ten ($10) each, and such shares shall be preferred to the shares of the common stock in the payment of dividends to the extent of seven per cent. per annum, payable semi-annually, from the profits of said company, the time and manner of such dividends to be provided for in the by-laws. Such preferred annual dividends shall be cumulative.

Beyond the annual dividend of seven per cent. payable
564 semi-annually as aforesaid, the holders of preferred shares shall not be entitled to participate in the profits of the company. Three hundred and fifty thousand ($350,000) dollars shall be divided into thirty-five thousand (35,000) shares of ten ($10) dollars each. The money realized from the sale of the preferred stock shall be devoted to paying the debts of the company and improving the plant as will be for the best interests of the company.

Which resolution was unanimously adopted, all the stockholders being present and voting therefor as follows:

A. O. Bement, 3,612 shares.
G. W. Bement, 3,612 shares.
Clarence E. Bement, 1,805 shares.
C. A. Gower, 1,805 shares.
A. F. Molitor, 586 shares.
H. S. Bartholomew, 231 shares.
Estate of A. S. Bement 350 shares.

(Signed) H. S. BARTHOLOMEW, *Secretary.*

The undersigned, being the president and all of the directors of E. Bement & Sons, do hereby certify that the articles of association of said corporation were at a meeting of the stockholders, duly called, amended by increasing the capital stock from three hundred thousand ($300,000) dollars to five hundred thousand ($500,000) dollars, and by authorizing one hundred and fifty thousand ($150,000) dollars of the increase of stock to be issued as preferred shares.

The annexed and foregoing is a true transcript from the records of such meeting upon the books of said corporation.

(Signed) A. O. BEMENT, *President.*
(Signed) G. W. BEMENT, *Director.*
(Signed) C. A. GOWER, *Director.*
(Signed) CLARENCE E. BEMENT, *Director.*

565 DEFENDANT'S EXHIBIT 134.

The judgment-roll in the case of William Strait and others against the National Harrow Company and others in supreme court, Chemung county. Not printed, but in place thereof the following statement of facts:

The action was brought by the service of the summons and complaint on the defendants in December, 1890. The object of the action was as was alleged in the complaint as follows: That William Strait, Elijah B. Smith and Hezekiah G. Mix were copartners doing business under the firm name of the Clipper Chilled Plow Company of Elmira, N. Y. and that they were engaged in the manufacture and sale of agricultural tools and implements, including float spring tooth harrows, and that they sold float spring tooth harrows to the trade in the New England and Middle States, Michigan, Ohio and Indiana and other States of the Union. That the National Harrow Company was a domestic corporation and that Charles H. Childs was president and Edwin Norris treasurer; that on or about the 10th day of November, 1890. Plaintiff in such action signed and deposited with Edwin H. Risley three written instruments, which are referred to in said complaint and copies of which are attached thereto and marked Exhibits 1, 2 and 3, (said exhibits being the same in form as Exhibits 1, 2 and 3 attached to the answer herein,) and that said Clipper Chilled Plow Company in said action claimed that said contracts were illegal and against public policy and in restraint of trade and asked to have the court adjudge them so to be, and also that it be decreed that said papers should be delivered up to said plaintiffs for cancellation and said plaintiffs in said action asked for an injunction restraining and enjoining the said National Harrow Company, its officers, and said Risley from receiving, holding or retaining said papers and putting the
566 same into use as operative instruments. That the defendants in said action appeared therein and answered, claiming in their answers and their defenses that said papers were valid. That said action was tried before the Hon. Walter Lloyd Smith, at a special term of the court held at Binghamton on the 20th day of January, 1891 and that said court decided said action in favor of plaintiffs and adjudged said contracts to be invalid and ordered the same delivered up for cancellation upon the ground that the same were in restraint of trade and against public policy and that judgement was entered accordingly in the Chemung county clerk's office on the 17th day of February, 1891.

Findings in said Case.

At a special term of the supreme court held in and for the county of Broome, 20th January, 1891.

Present: Hon. Walter Lloyd Smith, justice.

WILLIAM STRAIT ET AL.
against
THE NATIONAL HARROW COMPANY ET AL.

This case was tried before me and after having heard the evidence and the argument of counsel, after having duly considered the same, I hereby find the following facts:

1st. That on the 10th day of November, 1890, the plaintiffs and defendant signed papers, of which the following are copies:

Ex. "A" in the findings is Ex. "1" of amended answer and is printed as part of the judgment-roll at page 65.

567 Ex. "B" in the findings is Ex. "2" of amended answer and is printed as part of the judgment-roll at page 70.

Ex. "C" in the findings is Ex. "3" of amended answer and is printed as part of the judgment-roll at page 74.

2nd. The plaintiffs had theretofore manufactured simply a harrow of part wood and part steel, and were desirous before entering into the contracts, set forth in the first finding of fact, to be licensed to manufacture an all-steel frame harrow, a model of which was left with Mr. Risley.

3rd. That the papers set forth in the first finding of fact were left with Mr. Risley in escrow, to be delivered to the defendant corporation upon the granting by the executive committee of such corporation of a license to manufacture the harrow they had theretofore manufactured, and an all-steel frame harrow, a sample part of which was left with Mr. Risley as aforesaid. That the said executive committee was to meet and pass upon the question of the granting of the said license within a reasonable time, and after the samples had been received from the various parties with whom they were about to make like contracts.

4th. That contracts similar to those mentioned in the first finding of fact have been executed between the defendant and nineteen other firms and corporations, who, with the plaintiffs, constituted all of the manufacturers in the year 1890, of float spring tooth harrows in the United States.

5th. That the incorporators and trustees named in the certificate of the defendant corporation are all of them interested in, and representatives of the different parties manufacturers of float spring tooth harrows in the year 1890, who have since contracted

568 with the defendant corporation by contracts similar to those set forth in the first finding of fact.

6th. That under the contracts made with these manufacturers by the defendant, the defendant has fixed a uniform price at which certain styles of harrows must be sold, which price is in no way dependent upon the cost of manufacture.

7th. That in the organization of this defendant corporation, and in the making of said contracts, the plaintiffs, together with the nineteen firms and corporations who have so contracted with the defendant, have formed a combination in pursuance of a conspiracy to engross and control the market for the sale of float spring tooth harrows, and to control the price at which harrows shall be sold, and to prevent competition which acts are injurious to trade and commerce and the public good.

8th. That these plaintiffs, before the granting of the said license and before the happening of the event upon which the said contracts were to be delivered to the defendant corporation, have repented of their act in entering into such combination and have asked to be relieved from the aforesaid contract.

9th. That the defendant has obtained upon its counter-claim — this action, an injunction restraining the plaintiffs from the sale of any harrows, except at the prices fixed by the defendant corporation, as mentioned in the sixth finding of fact.

I find as conclusions of law:

1st. That the contracts set forth in the first finding of fact being made for the purpose set forth in the seventh finding of fact, are illegal and void.

2nd. That the plaintiffs having repented of their illegal act may come into a court of equity and ask to be relieved therefrom.

3rd. That the plaintiffs are entitled in this action to a
569 judgment requiring the papers left with said Risley, and set forth in the first finding of fact, to be delivered up for cancellation, and adjudging the same to be void and enjoining the defendant, Risley, from delivering the said papers to the defendant corporation, and enjoining the defendant corporation from receiving said papers, and from putting the same into use as operative instruments.

4th. That the defendant is not entitled to the relief asked in its counter-claim, and the injunction granted herein to the defendant upon its counter-claim should be vacated and set aside.

5th. The clerk will enter judgment in accordance with these findings, with costs against the defendant, The National Harrow Company.

WALTER LLOYD SMITH.
Justice Supreme Court.

Endorsed: Filed Feb. 17, 1891.

Judgment in said Case.

At a special term of the supreme court, held at the court-house in the city of Elmira, in and for the county of Chemung, on the 17th day of February, A. D. 1891.

Present: Hon. Charles E. Parker, justice.

WILLIAM STRAIT, ELIJAH B. SMITH, and HEZEKIAH G. MIX
against
EDWIN H. RISLEY, CHARLES H. CHILDS, EDWARD NORRIS, and THE NATIONAL HARROW COMPANY.

This action having been begun by service of the summons and copy complaint therein upon the defendants above named personally within the State of New York, and said defendants having severally appeared and the defendants Edwin H. Risley, Charles H. Childs and Edward Norris answered separately by their joint answer, and the defendant The National Harrow Company answered by its separate answer, and the said defendant The National Harrow Company having upon the complaint, its answer and affidavits therein recited obtained an injunction order dated December 31, 1890, granted by Hon. George N. Kennedy, a justice of this court, whereby the plaintiffs were enjoined and restrained from selling, offering for sale, delivering or offering for delivery, spring tooth harrows on more favorable or different terms than as in said injunction order prescribed, and a motion on behalf of plaintiffs to vacate said injunction order having been brought to a hearing at a special term of this court held at the court-house in the city of Elmira on the 9th day of January, 1891, and at the same term a motion on behalf of the defendant The National Harrow Company to vacate an order obtained by the plaintiffs dated December 5, 1890, granted by Hon. Walter Lloyd Smith, a justice of this court, which enjoined and restrained said defendant from putting in use as operative instruments, the agreements for the cancellation of which this action was brought having also been brought to a hearing, and thereupon at said special term, upon stipulation of the parties duly filed, an order of this court having been duly made and entered whereby said motions were postponed for further hearing at the Broome special term which began January 20, 1891, and whereby provisions were made for amendment of the pleadings, and whereby it was further ordered and directed that the issues in the action should be tried at said special term of this court held in Broome county beginning January 20, 1891, with like effect as though tried upon regular notice of trial in Chemung county, the venue of the action, and pursuant to the provisions of
571 said order the defendant The National Harrow Company having served an amended answer, and the plaintiffs having served a reply thereto, and the issue formed upon the complaint of the plaintiffs, the answer of the defendants, Edwin H. Risley, Charles H. Childs and Edward Norris, the amended answer of the defendant, The National Harrow Company, and the reply of the plaintiffs thereto, having been duly tried at said special term held in Broome county, beginning January 20, 1891, with like effect as though tried upon regular notice of trial in Chemung county, and the court having duly made its decision in writing duly filed, whereby judgment is directed as hereinafter adjudged. Now upon motion of Youmans, Moss & Knipp, attorneys for the plaintiffs it is adjudged as follows:

The plaintiffs, William Strait, Elijah B. Smith and Hezekiah G

Mix, are copartners doing business at the city of Elmira, N. Y., under the firm name and style of the Clipper Chilled Plow Co.

The defendant The National Harrow Company is a domestic corporation having its principal office at Utica, N. Y.

On the 10th day of November, 1890, the plaintiffs and said defendant signed papers, of which the following are copies:

Ex. "A" in the judgment is Ex. "1" of amended answer, and is printed as part of the judgment-roll at page 65.

Ex. "B" in the judgment is Ex. "2" of amended answer, and is printed as part of the judgment-roll at page 70.

Ex. "C" in the judgment is Ex. "3" of amended answer*ed*, and is printed as part of the judgment-roll at page 74.

The plaintiffs had theretofore manufactured simply a harrow
572 of part wood and part steel, and were desirous before entering into the contracts, above set forth, to be licensed to manufacture an all-steel-frame harrow, a model of which was left with Mr. Risley.

The papers above set forth were left with the defendant Edwin H. Risley in escrow, to be delivered to the defendant The National Harrow Company upon the granting by the executive committee of such corporation of a license to manufacture the harrow they had theretofore manufactured, and an all-steel-frame harrow, a sample part of which was left with Mr. Risley as aforesaid. The executive committee was to meet and pass upon the question of the granting of the said license within a reasonable time, and after the samples had been received from the various parties with whom they were about to make like contracts.

Contracts similar to those above mentioned have been executed between the defendant The National Harrow Company and nineteen other firms and corporations, who, with the plaintiff, constituted all of the manufacturers in the year 1890 of float spring tooth harrows in the United States.

The incorporators and trustees named in the certificates of the defendant corporation, The National Harrow Company, are all of them interested in, and representatives of the different parties, manufacturers of float spring tooth harrows in the year 1890, who have since contracted with the said defendant corporation by contracts similar to those above set forth.

Under the contracts made with these manufacturers by the said defendant, said defendant has fixed a uniform price at which certain styles of harrows must be sold, which price is in no way dependent upon the cost of manufacture.

In the organization of said defendant corporation, The National Harrow Company, and in the making of said contracts, the
573 plaintiffs, together with the nineteen other firms and corporations who have so contracted with the defendant have formed a combination in pursuance of a conspiracy to engross and control the market for the sale of float spring tooth harrows and to control the price at which harrows shall be sold, and to prevent competition, which acts are injurious to trade and commerce and the public good.

These plaintiffs, before the granting of the said license and before the happening of the event upon which the said contracts were to be delivered to the said defendant corporation, The National Harrow Company, have repented of their act in entering into such combination and have asked to be relieved from the aforesaid contract.

The said defendant The National Harrow Company has obtained upon its counter-claim in this action, an injunction restraining the plaintiffs from the sale of any harrows, except at the prices fixed by the said defendant corporation The National Harrow Company, as hereinbefore mentioned, being the aforesaid injunction order of date December 31, 1890. And it is hereby further adjudged as follows:

The contracts above set forth, being made for the purposes hereinbefore set forth, are illegal and void. And the plaintiffs having repented of their illegal act may come into a court of equity and ask to be relieved therefrom.

It is hereby further adjudged that the defendant Edwin H. Risley, be and he hereby is required and directed, upon service of copy of this judgment and upon request therefor to deliver up to the plaintiffs for cancellation the papers above set forth so as hereinbefore stated signed by the plaintiffs and said defendant The National Harrow Company and left with said defendant Edwin H. Risley in escrow, which papers are hereby adjudged to be void and the same are hereby canceled and set at nought, and he said defendant Edwin H. Risley is hereby perpetually enjoined and restrained under the penalties of law from delivering the said papers to the said defendant corporation, The National Harrow Company. And it is hereby further adjudged that the said defendant, The National Harrow Company, its officers, agents, servants and attorneys, be, and they hereby are, perpetually enjoined and restrained under the penalties of law from receiving said papers, and from putting the same into use as operative instruments, and from instituting in any court whatever any action or suit at law or in equity thereon or setting the same up or pleading the same in any such action or suit, and from suing out or issuing in any such action or suit or upon any provision of said papers any summons, writ, order, judgment, decree or other process whatever against the plaintiffs in this action.

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It is further adjudged that the defendant, The National Harrow Company, is not entitled to the relief asked in its counter-claim, that it was not entitled to the injunction obtained by it thereon by said injunction order of December 31, 1890, and that said order be and the same hereby is vacated and set aside.

It is further adjudged that the plaintiffs recover of the defendant, The National Harrow Company, their costs of the action to be taxed by the clerk and here inserted being the sum of — dollars and — cents, and that they have execution therefor.

A. S. FITCH, *Clerk.*

(Copy.)

Endorsed: "Filed Feb. 17, 1891." 4.50 p. m.

575 Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

The defendant, E. Bement & Sons, through its attorneys excepts to the report and decision of W. A. Matteson, the referee herein, which said report bears date June 5, 1895, and also separately to the 1st, 2d, 3d, 4th, 5th, 6th, 7th and 8th conclusions of law therein.

Dated June 24, 1895.

COOKINHAM & SHERMAN,
Att'ys for Def't.

To Risley, Robinson & Love, attorneys for plaintiff, and Garry A. Willard, county clerk of Oneida county.

Personal service of a copy of the within exception admitted this 25th day of June, 1895.

RISLEY, ROBINSON & LOVE,
Attorneys for Plaintiff.
GARRY A. WILLARD, *County Clerk.*

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

Please take notice that the defendant appeals to the general term of this court for the fourth department, from the judgment of this court herein entered in the office of the clerk of the county
576 of Oneida on the 11th day of June, 1895, and from each and every part thereof.

July 29, 1895.

COOKINHAM & SHERMAN,
Attorneys for the Appellant, 21 Mann Building, Utica, N. Y.

To the clerk of the county of Oneida, and to Risley, Robinson & Love, attorneys for plaintiff.

Service of a copy of the above notice of appeal is hereby admitted this 29th day of July, 1895.

RISLEY, ROBINSON & LOVE,
Att'ys for Plaintiff.
GARRY A. WILLARD, *County Clerk.*

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

It is hereby stipulated by the undersigned that Cookinham, Sherman & Martin be substituted as attorneys of record for E. Bement & Sons, defendant herein, without further notice.

COOKINHAM & SHERMAN,
Att'ys for Def't.

Dated Sept. 5, 1895.

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

On reading the above stipulation of defendant's attorneys
577 herein ordered that Cookinham, Sherman & Martin be and are hereby substituted as attorneys for the defendant herein instead of Cookinham & Sherman.

Dated Sept. 5, 1895.

W. T. DUNMORE,
Oneida County Judge.

Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
against
E. BEMENT & SONS.

It is hereby stipulated by the attorneys for the respective parties under section 3301 of the Code of Civil Procedure that the certificate of the clerk as required by section 1353 of the Code of Civil Procedure is expressly waived and that the case and exceptions hereto annexed have been duly settled and that a printed copy thereof may be filed with the clerk of the court instead of the original.

Dated Sept. 16th, 1895.

RISLEY, ROBINSON & LOVE,
Attorneys for Plaintiff.
COOKINHAM, SHERMAN & MARTIN,
Attorneys for Defendant.

The foregoing case and proposed amendments thereto having been duly settled by me, and the respective attorneys herein consenting that a printed copy thereof be filed in place and stead of the typewritten copy, I hereby order and direct the clerk of Oneida county to file the foregoing printed case on appeal.

Dated Utica, N. Y., Nov. 21st, 1895.

W. A. MATTESON, *Referee.*

578 *Amended Form of Complaint.*

Supreme Court, Oneida County.

NATIONAL HARROW COMPANY
vs.
E. BEMENT & SONS.

The plaintiff for a cause of action against the defendants, allege the following facts constituting its cause of action:

First. That the plaintiff is a corporation organized under the laws of the State of New Jersey, having an office and place of business at the city of Utica, county of Oneida, and State of New York.

Second. That the defendant is a corporation duly organized and doing business at the city of Lansing, Mich.

Third. That the National Harrow Company, hereinafter referred to, was a corporation duly organized under the laws of the State of New York, having its office and place of business at Utica, N. Y.

Fourth. That on or about the 1st day of April, 1891, the National Harrow Company, of the State of New York, at the city of Utica, N. Y., entered into license contracts with the defendants, copies of which contracts are hereto annexed and marked Exhibits "A" and "B" and are made a part of this complaint.

That both corporations entered upon the performance of the stipulation and agreements contained in said license contracts Exhibits 'A" and "B."

Fifth. The National Harrow Company of the State of New York, on or about the 9th day of September, 1891, duly sold, assigned, transferred and delivered to the National Harrow Company
579 of New Jersey, this plaintiff, all of its right, title and interest in and to the license contracts, (Exhibit- "A" and "B,") and to all rights of action, privileges and benefits secured under and by virtue of said license contracts aforesaid; and thereupon this plaintiff became, and was and now is, the owner and holder of all the rights, privileges and benefits arising or growing out of the license contracts Exhibit- "A" and "B." (License contract- "A" and "B" are printed in full at pages 9 to 28 of the printed record.

Sixth. That this defendant and this plaintiff have conducted their business with reference to the license contracts, and this plaintiff has lived up to all of the requirements thereof. That the defendant has failed, neglected, and refused to live up to the requirements of the same.

Seventh. That this plaintiff has performed all of the stipulations, conditions and agreements to be done and performed on its part, as assignee of said licenses, and is now ready to and willing and desires to perform hereafter, all of the stipulations and requirements specified and set forth in said license contracts to be performed on the part of the National Harrow Company.

Eighth. That on and prior to the 1st day of August, 1893, the defendant reported to the plaintiff 13,900 harrows sold in accordance

with the license contracts, and paid royalty on the same. That in making and serving the said verified reports, the defendant failed, neglected and refused to report all of the float spring tooth harrows and float spring tooth harrow frames which it had sold, and omitted to pay the royalty on the same. That the defendant, in fact, has sold and delivered float spring tooth harrows, float spring tooth harrow frames and attachments applicable thereto, to the number of 18,097, between the 10th of September, 1890, and the 1st day of January, 1895. That upon information and belief, the plain-
580 tiff alleges that all of these harrows have been sold and settled for at less prices and on more favorable terms to purchasers than the prices specified and contained in the license contracts. That the defendant has failed, neglected and refused to perform the stipulations and conditions to be performed on its part, and has violated and is violating and intends to violate the stipulations and conditions agreed to be done and performed on its part in the following particulars:

(*a.*) The defendant has failed, neglected and refused, although repeatedly requested so to do, to perform the stipulations contained in the second clause of the license contracts, by refusing to sign and verify reports, and to mail the same to the National Harrow Company of the sales of harrows, harrow frames and attachments applicable thereto, between the first and tenth days of each month since the first day of August, 1893, since which time it has made no reports, although it has sold and delivered a large number of harrows, harrow frames and attachments applicable thereto. That while the defendant has kept books in which it has entered sales of harrows, harrow frames and attachments applicable thereto, it has refused and still refuses, upon request being made, to allow this plaintiff, or its duly authorized agent to inspect during business hours, said books, and has refused and still refuses to allow extracts or statements to be taken from their said books for the information of the plaintiff. And it has, in violation of the terms of said license contracts, sold and delivered harrows, harrow frames and attachments applicable thereto, and delivered the same to the parties purchasing the same, to wit, to J. H. Wilhelm, Myerstown, Pa., to be sold on commission; and has, in violation of the terms of said license, allowed rebates or discounts from the prices fixed in the license contracts, in violation of the terms thereof, to wit, they have allowed re-
581 bates and discounts, not authorized by the terms of said license, to J. H. Wilhelm, of Myerstown, Pa., and to Coleman & Horton, of Nichols, Tioga county, N. Y., and to a large number of other persons, firms and corporations whose names are not now known to this plaintiff, and for that reason cannot be stated with more definiteness. That the rate of discount allowed to said parties, and to all other parties to whom the defendants have sold, and rebate is from $1.50 to $2.00 in addition to the 10 per cent. discount authorized by the terms of the licenses; all of which has been done in violation of the terms of said license contracts, and in defiance of the rights and benefits secured to this plaintiff under said licenses.

(*b.*) That although this plaintiff has prepared and kept on hand,

license labels provided to be placed upon the harrows under the fifth clause of the license contracts, the defendant has failed, neglected and refused, and still fails, neglects and refuses to attach and apply said license labels to the harrows sold by the defendant since August 1, 1893.

(*c.*) That the defendant has, contrary to and in violation of the sixth clause of said contracts, manufactured and sold, and has now on hand for sale, and intends to sell, other and different harrows, harrow frames and attachments applicable thereto, and other and different constructions from those licensed by the terms of said license contracts; and that they have manufactured and sold a large number of lever harrows employing curved teeth, known and designated by them in the trade, as the "Ajax" harrow. That said harrows have not been manufactured or sold or furnished to the other licensees of this plaintiff.

(*d.*) That by reason of the breaches of the conditions of the license contracts, hereinbefore referred to, the defendants are liable to account to this plaintiff for all harrows sold and delivered in
582 violation of the terms of said license contracts, to pay on all such harrows the sum of five dollars, as fixed and liquidated damages therefor, and on account thereof, as provided to be paid in the seventh clause of said license contracts.

(*e.*) That the defendants have, in violation of the eighth clause of said license contracts, altered and changed the construction of the harrow, harrow frames and attachments applicable thereto, whereby the harrow has been made to differ in its manufacture and structure from the one licensed to be sold in accordance with the terms of said license contracts; and that they are now selling, offering for sale, and have now on hand for sale, such altered and different harrows from those covered by the terms of said license contract.

"(*f.*) That the defendant, in violation of the tenth clause of said license contracts, has authorized, permitted, and is now authorizing and permitting, and has procured to be manufactured, other and different styles of harrows than duplicates of the sample harrows which the defendant deposited with and which *is* now in the possession of the secretary of this plaintiff, as the sample harrows, duplicates of which the defendants are authorized to manufacture and sell, and they have now on hand a quantity of said altered and different harrows for sale and will sell the same in violation of the terms of the tenth clause of said license contract."

"(*g.*) That by the eleventh clause of said license contracts, this plaintiff, by agreement, was authorized and is now authorized to restrain the breaches of the conditions of the said license contracts, as hereinbefore specified, by an injunction restraining further breaches thereof."

"(*h.*) That the defendant has sold and delivered and is now selling and delivering float spring tooth harrows and float spring
583 tooth harrow frames during the lifetime of the license, to purchasers at less prices and on more favorable terms of payment than those which it was authorized to sell, and has sold other and different styles and constructions of float spring tooth harrows

and float spring tooth harrow frames than those which it was licensed to manufacture and sell, to wit: it has sold, on or prior to January 1st, 1895, 3,026 'Clipper' harrows complete, whereas it was only authorized to sell 'Clipper' wood frame unlined harrows without teeth; that it has sold and delivered float spring tooth harrows and float spring tooth harrow frames which it was not authorized to sell, known as the 'Reliance' harrow, to the number of six; that it has sold and delivered 'Ajax' lever float spring tooth harrows, which it had not been licensed to manufacture and sell, which were float spring tooth harrows, prior to January 1st, 1895, to the number of 2,849; that the defendant has sold other float spring tooth harrows and float spring tooth harrow frames, known as the 'Lansing' harrow, prior to January 1st, 1895, to the number of 392.

Ninth. That this plaintiff has a large number of other licensees whose business is interfered with and interrupted by the wrongful conduct of the defendants in the particulars hereinbefore stated, and that this plaintiff will be put to great damage and expense, and a multiplicity of suits to restrain the wrongs and grievances growing out of the conduct on the part of the defendants, and it will suffer irreparable damages and injury which is not capable of being compensated in damages by the continued repetition of the wrongs and injuries committed by the defendants in violation of the terms and conditions of the license contract.

Tenth. That before the commencement of this action the plaintiff and the defendant corporation filed with the secretary of state of the State of New York, a sworn copy of their respective charters or
584 certificates of incorporation and a statement under their respective corporate seals, setting forth the business or object of the corporation which they were respectively engaged in carrying on within the State, and the place within the State which is to be its place of business, and each designating a person upon whom process against the corporation might be served within the State; and the persons so designated respectively have each a place of business within the State of New York wherein the respective corporations perform their corporate functions and acts and conduct their business. That the contract set forth in the complaint was made, executed and delivered, and was by its terms to be performed within the State of New York, and breaches of said contract have occurred within the State of New York.

Eleventh. At the time of the execution and delivery of the license contracts, the National Harrow Company of New York purchased from the defendant certain U. S. letters patent, relating to harrows, which it was then manufacturing, for which the National Harrow Company of New York paid to the defendant, in its paid-up stock, the sum of $46,200; and a certain license contract based upon letters patent of the United States, granted by Charles La Dow to the defendant, was also sold and assigned to the said National Harrow Company of New York, for the consideration aforesaid. And the defendant being desirous, not only of using the patents which it had assigned, but also the patents owned by the

said New York corporation, which were embodied and stated in the license contracts, entered into contracts 'A' and 'B' which were part and parcel of the same transaction; and the said defendant now holds the stock of this plaintiff, substituted for the stock of the National Harrow Company of New York, on which it has received regular annual dividends up to the year 1894. And
585 the defendant has never abandoned the manufacture and sale of harrows under the license contract, but is now using the same. And the defendant is, by its acts and conduct, estopped from questioning the validity of the license contracts."

Twelfth. The plaintiff alleges that wherever the words "float spring tooth harrow, float spring tooth harrow frame and attachments applicable thereto" appears in the license contracts or in this complaint, that the same *was* intended to, and did, embrace every style and variety of harrow employing curved teeth, excepting only wheel harrows as constructed at the date of the license contracts, which consisted in supporting the frame bars and teeth from the under side of the axletree which carried wheels at either end of more than two feet in diameter.

Wherefore, the plaintiff demands judgment,

1st. That a temporary injunction be granted restraining the defendants, their agents, attorneys, servants and employés from doing or suffering to be done any act or thing in contravention of the terms of the license contracts attached to and made a part of this complaint.

2d. That the defendants be decreed by the judgment of this court to perform all of the terms and conditions of the license contract to be done and performed on the part of the defendants according to its true intent and meaning; and the defendants be perpetually enjoined and restrained from violating or suffering to be violated any of the terms and conditions of the license contract during its continuance.

3d. That the plaintiff have such other and further relief in the premises as may be just and equitable; and that the defendants be decreed to account to the plaintiff for all harrows sold, in accordance with the terms of the license contract, and for all harrows sold by the defendants in violation of the terms and conditions of
586 said license; and that the defendants be decreed to pay to the plaintiff all damages sustained by the plaintiff by reason of the violation of the terms and conditions of said license contract; and that the plaintiff have such other and further relief as to the court may seem just and equitable; and that the defendants be decreed to pay the costs of this action.

THE NATIONAL HARROW COMPANY,
[L. S.] By ORLANDO J. CHILDS, *Pres't.*

RISLEY, ROBINSON & LOVE,
Plaintiff's Attorneys.

Office and post-office address, Herald building, Utica, N. Y.

STATE OF NEW YORK, } ss:
County of Oneida, }

Orlando J. Childs, being duly sworn, says that he is the president of the plaintiff, and signed the corporate name to the foregoing bill of complaint, and caused the corporate seal to be affixed thereto; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

ORLANDO J. CHILDS.

Subscribed and sworn to before me this 3d day of July, 1894.

H. C. SHOLES,
Notary Public, Oneida County, N. Y.

587 *Amended Form of Answer.*

Supreme Court, Oneida County.

NATIONAL HARROW COMPANY }
vs.
E. BEMENT & SONS. }

The defendant above named for answer to the complaint of the plaintiff herein pleads and alleges as follows:

First. Defendant admits that the plaintiff and defendant are corporations as in the complaint alleged.

Second. Defendant admits that the National Harrow Company of Utica, N. Y. was a corporation as alleged in said complaint.

Third. Defendant admits that the said National Harrow Company of Utica, N. Y. entered into the alleged license contracts "A" & "B" with the defendant as alleged in said complaint, but says that the agreements for said alleged licenses A and B were a part only and were made in pursuance of another agreement hereto annexed and marked "Exhibit 1," before that time entered into between the plaintiff and divers other persons, the purpose, object and intent of which was to limit, control and regulate the amount and quantity of production of the float spring tooth harrows to be manufactured and sold in the United States, and to regulate and control the market price thereof, as hereinafter shown.

And defendant admits that on or about the 9th day of September, 1891, said National Harrow Company of New York and said National Harrow Company of New Jersey entered into the agreement which is referred to in the complaint in this action, a copy of which is annexed to said complaint and marked "Agreement" and
588 signed by the National Harrow Company by H. H. Durr, president, Charles A. Long, treasurer, and also by the National Harrow Company of Utica, by Charles H. Childs, president, and Edward Norris, treasurer. But said defendant alleges that it has not sufficient knowledge or information to form a belief as to whether or not said agreement was operative and

whether or not it transferred to the National Harrow Company of New Jersey all the patents and interests in patents applicable to spring tooth harrows or any part thereof, and all applications then pending, covering spring tooth harrows or parts thereof, or all money, merchandise, licenses, agreements, contracts and property of every name and nature, except $1,000 in cash, or all the claims and rights of action owned by the said National Harrow Company of Utica, N. Y. to said National Harrow Company of New Jersey, and therefore denies the same.

Defendant further denies on information and belief, that all the rights, title and interest which said The National Harrow Company of Utica had in the alleged license contracts set out in the complaint herein as Exhibits "A" & "B" were transferred by said The National Harrow Company of Utica to said National Harrow Company of New Jersey.

Fourth. Defendant admits that it performed all the stipulations contained in the said alleged license contracts A & B, and lived up to the requirements thereof up to the first day of August, 1893, but defendant denies on information and belief, that said National Harrow Company of New Jersey performed the stipulations contained in said alleged license contracts and lived up to the requirements thereof on its part, prior to said first day of August, 1893, and defendant denies upon information and belief, that said National Harrow Company of New Jersey has performed all of the stipulations, conditions and agreements to be done and performed on its part as assignee of said alleged license contracts A & B,
589 or that the said National Harrow Company of New Jersey is ready or willing to perform all of the said stipulations and requirements on its part.

Fifth. Defendant further answering said complaint admits that it has not signed and verified reports and mailed the same to the National Harrow Company of New Jersey of the sales of harrows, harrow frames, and attachments applicable thereto between the first and tenth day of each month, since the first day of August, 1893. Defendant also admits that since that time it has made no reports and that it has sold and delivered a large number of harrows, harrow frames, and attachments applicable thereto, but defendant denies that said harrows so manufactured and sold by it were covered by said alleged licenses A & B, or that any part of or attachment to said harrows were covered by said alleged licenses A & B or by any patent owned or claimed to be owned by the plaintiff.

Defendant further admits that it has kept books in which it has entered its sales of harrows, harrow frames and attachments applicable thereto, that it has refused and still does refuse to allow the plaintiff or its duly authorized agent to inspect, during business hours, said books, and that it has refused and still does refuse to allow extracts to be taken from their said books for the information of the plaintiff, and defendant further alleges that said books contained entries of sales of harrows and harrow frames, and attachments applicable thereto, very few of which are even in form covered by the alleged licenses A & B referred to in the complaint herein.

Defendant further denies that it has sold to J. H. Wilhelm, of Myerstown, Pa., any harrows to be sold on commission, or that it has sold to said Wilhelm, since the first day of August, 1893, any harrows, which harrows or any part thereof, or attachments
590 thereto, were covered by the alleged licenses A and B referred to in the complaint herein. Defendant denies that it has allowed any rebates or discounts to said Wilhelm on any harrows covered by the said alleged licenses.

Defendant denies that it has sold on commission any harrows covered by said alleged licenses A and B to Coleman & Horton, of Nichols, Tioga county, N. Y., nor has said defendant allowed any rebates or discounts upon any harrows covered by said alleged licenses A and B sold to said Coleman & Horton, or any other person or persons except as will hereafter more fully appear in this answer.

Defendant further alleges that as it is informed and verily believes the harrows sold to said Coleman & Horton and said Wilhelm were "Ajax" lever harrows and not float spring tooth harrows, and that so far as defendant is notified said Wilhelm had two harrows known as Steel Kings, as stated in the affidavit of said Wilhelm dated June 19, 1894, in this action.

Defendant further admits that plaintiff has kept on hand labels to be placed upon harrows for those who desire the same, but that defendant has not placed any labels upon such harrows as it has manufactured or sold and which are not float spring tooth harrows.

Defendant further answering said complaint admits that it has manufactured and sold and has now on hand for sale and intends to sell other and different harrows, harrow frames and attachments applicable thereto, and other and different constructions from those referred to in said alleged license contracts A and B, and that said defendant has manufactured and sold a number of lever harrows employing curved teeth, known and designated by defendant in its trade as the "Ajax" harrow, and that said harrows have not been manufactured or sold or furnished any licensees of this plaintiff, but defendant denies that said harrows are float spring tooth har-
591 rows or that said harrow is covered by said alleged license contracts A and B set forth in the complaint.

Sixth. Defendant further answering said complaint, denies that by reason of any breaches of the conditions of the alleged license contracts A and B, hereinbefore referred to, the defendant is liable to account to plaintiff for any harrows sold or delivered by it, or pay to said plaintiff any damages, either liquidated or otherwise.

Seventh. Defendant further answering said complaint, denies that it has violated the eighth clause of said alleged license contracts, or that it has altered or changed the construction of the harrow, harrow frame, or attachments applicable thereto, such as referred to in said alleged licenses, or that they are now manufacturing, selling, offering for sale, or that they have on hand any such harrows altered from those covered by the terms of said alleged license contracts. But defendant admits and alleges that it is now and has been manufacturing and selling harrows which are not covered by said alleged

license contracts A and B, nor is any part of said harrows or any attachments thereto covered by said alleged license contracts A and B.

Eighth. Defendant further answering said complaint denies that it has violated the tenth clause of said alleged license contracts, or that it has permitted or authorized, or procured to be manufactured other or different styles of float spring tooth harrows than duplicates of the sample harrows which the defendant deposited with, and which are now in the possession of the secretary of the plaintiff as the sample harrows, duplicates of which the defendant was authorized to manufacture and sell by said alleged license contracts A and B, but defendant alleges that the harrows which it has manufactured, authorized or permitted to be manufactured or sold are not covered by said alleged license contracts A and B, or by any patent owned by said plaintiff.

592 Defendant denies that it has any harrows which are covered by said alleged license contracts A and B, which have been altered in violation of the tenth clause of said license contracts. The defendant admits and alleges that it has on hand, harrows entirely different in form and construction than duplicates of those which were deposited with the secretary of said plaintiff. But defendant alleges that none of said harrows or parts thereof, or attachments thereto are covered by said alleged license contracts A and B, except such harrows as are known as the "Steel King" and one known as "Wood Frame Lined, Without Teeth," a very few of which defendant has manufactured and sold, or offered for sale since the first day of August, 1893.

Ninth. For further answer to the said complaint, in regard to the sale of harrows referred to in said complaint, which plaintiff alleges were sold in violation of the terms of the alleged license contracts A and B, defendant alleges that the defendant sold harrows through traveling agents, whose salaries were based upon the amount of goods sold by them, and that the agreements with such agents are that they shall make no rebate or allowance of any kind exceeding two dollars upon each harrow, and that if said traveling agents make any allowance to a customer from the prices fixed upon the specific harrows as set forth in said alleged license contracts A and B, said allowances shall be taken in full from the salaries which otherwise would be allowed to said traveling agents. Defendant alleges on information and belief that no allowance has ever been made by it of more than two dollars per harrow.

Tenth. For further answer to said complaint defendant alleges that it has attached to the harrow known as "Steel King" and the harrow known as "Wood Frame Lined, Without Teeth," the

593 labels provided for in said alleged license contracts A and B, but that none of the said labels have been attached to any other harrows manufactured or sold by said defendant since the first day of August, 1893. And defendant further denies that it has manufactured or sold or offered for sale, or has on hand for the purpose of offering the same for sale any float spring tooth harrows, harrow frames without teeth, or attachments applicable thereto, ex-

cept the "Steel King" and the harrow known as "Wood Frame Lined," referred to in said alleged contracts A and B. And defendant denies upon information and belief that it has made, manufactured, sold or offered for sale any harrow of any kind, except those mentioned in said alleged contracts A and B, and such as were not float spring tooth harrows or float spring tooth harrow frames without teeth or attachments applicable thereto.

Defendant denies all that part of said amended complaint designated as "sixth." Also all that part of said amended complaint designated as "eighth." Also all that part of said amended complaint under the ninth clause designated as (*h*). Also every allegation in said amended complaint in the subdivisions designated as "eleventh" and "twelfth."

Eleventh. Said defendant further answering the said complaint alleges on information and belief that some time in the year 1890, or early in 1891, a number of persons, corporations and copartnerships who manufactured and sold all or substantially all, the spring tooth harrows manufactured or sold in the United States, entered into agreements, copies of which, except as to the name of the particular party who contracted with the National Harrow Company, are hereunto attached and marked respectively, Exhibits 1, 2 and 3, No. 4½, hereunto attached, being a statement of the prices and terms of sale agreed upon by said parties. Ex. 1—same as
594 Ex. 1 on pg. 65; Ex. 2—same as Ex. 2 on pg. 70; Ex. 3—same as Ex. 3 on pg. 74; Ex. 4½—same as Ex. 4½ on pg. 77. That said persons, corporations and copartnerships were as follows:

D. C. & H. C. Reed, Kalamazoo, Michigan; C. H. Childs & Company, Utica, N. Y.; A. W. Stevens & Company, Auburn, N. Y.; Taylor & Henry, Kalamazoo, Michigan; W. S. Lawrence, Kalamazoo, Michigan; Eureka Mower Company, a corporation organized under the laws of the State of New York, Utica, N. Y.; Hench & Dromgold, York, Penn.; George Sweet & Company, Dansville, N. Y.; D. B. Smith & Company, Utica, N. Y.; L. C. Lull & Company, Kalamazoo, Michigan; the Walker Manufacturing Company, a corporation organized under the laws of the State of New York, Moravia, N. Y.; the Farmers' Friend Manufacturing Company, a corporation organized under the laws of the State of Ohio, Dayton, Ohio; Herndeen Manufacturing Company, a corporation organized under the laws of the State of New York, Geneva, N. Y.; the Williams Manufacturing Company, a corporation organized under the laws of the State of Michigan, Kalamazoo, Michigan; D. O. Everest & Company, Pine Grove, Michigan; Childs & Jones, Utica, N. Y.; the McSherry Manufacturing Company, a corporation organized under the laws of the State of Ohio, Dayton, Ohio; the Clipper Chilled Plow Company, Elmira, N. Y., E. Bement & Sons, a corporation organized under the laws of the State of Michigan, Lansing, Mich.

That said Clipper Chilled Plow Company of Elmira, N. Y., was a copartnership consisting of William Strait, and others, and that said copartnership signed said agreements, and such agreements were

left in the possession of Edwin H. Risley of Utica, N. Y., or William H. Howard of Kalamazoo, Michigan, to be delivered, each
595 respectively to the National Harrow Company and a duplicate thereof to each party who entered into the agreement with said National Harrow Company.

That said Clipper Chilled Plow Company entered into an agreement with said Risley to leave said papers signed by it in his possession under the agreement hereto attached and marked Exhibit 4. (Same as Ex. 4 pg. 76.)

The defendant further alleges that about the time said Exhibits 1, 2, 3 and 4½, were executed or agreed upon, it was agreed between the parties executing the same, that a corporation should be formed known as the National Harrow Company of Utica, N. Y., and that paid-up capital stock of said company should be issued to all of the parties who should sign the agreements, Exhibits 1, 2, 3 and 4½, or assent thereto, and assign their patents pending applications for patents and the good will of the business of the respective parties who entered into such agreements to the said National Harrow Company.

That such corporation known as the National Harrow Company of Utica, N. Y., was formed among said parties, and that thereafter said corporation did issue its paid-up capital stock to the parties aforesaid in payment for patents, applications for patents and rights thereunder, which each of said parties transferred to said National Harrow Company of New York. That said stock was issued in payment for the property and rights aforesaid to said parties respectively after the award of the arbitrators, mentioned in Exhibit 6, attached hereto, or in some instances to an individual, the share which was awarded to such of said parties as were corporations, except in the case of the said Clipper Chilled Plow Company.

That said National Harrow Company of Utica, N. Y., is the predecessor of the plaintiff herein, as to all rights of every name and nature in said license contracts mentioned in the complaint
596 herein, and under most of the patents now owned by plaintiff, if plaintiff has any right in the same, and which are described in said contracts mentioned in the complaint herein. That immediately after the signing of said agreements known as Exhibits 1, 2, 3, 4 and 4½, said Clipper Chilled Plow Company brought an action in the supreme court of the State of New York, in the county of Chemung, against said National Harrow Company and others to prevent the said papers being delivered to said National Harrow Company, and for the cancellation of the same upon the ground that the same were void as being in restraint of trade and against public policy; that said action was tried at a special term of said court before Hon. Walter Lloyd Smith, one of the justices of said court, about January, 1892, and that said court decided that the agreements were void upon the ground aforesaid, and that the same constituted an illegal combination and ordered the same delivered up to said Clipper Chilled Plow Company for cancellation.

Defendant further alleges that thereafter all of said parties, with the exception of said Clipper Chilled Plow Company and E. Bement

& Sons, entered into an agreement that all said agreements known as Exhibits 1, 2, 3 and 4½, should be cancelled as among themselves, and that this agreement was made on or about the first day of April, 1891. That about the same date, all of said parties except the said Clipper Chilled Plow Company and E. Bement & Sons entered into certain other agreements, copies of which except the name of the particular parties with which the National Harrow Company made the particular agreements are hereto attached and marked Exhibits 5, 6, and 7. Exhibit 7, being the same in form as Exhibits A and B, attached to the complaint herein, and which is alleged in the complaint herein, if any such agreement was ever made, as defendant is informed and verily believes. That said agreements, Exhibits 5, 6 and 7 were
597 intended to take the place of said prior agreements, Exhibits 1, 2, 3 and 4½, and were in reality a continuation of the aforesaid agreements, except as said later agreements, Exhibits 5, 6 and 7, differ in form from the former. That defendant assented to said arrangement on or about the 17th day of June, 1891, and signed agreements like Exhibits 5, 6 and 7, (Ex. 5 same as Ex. 5, pg. 78; Ex. 6 same as Ex. 6, pg. 80; Ex. 7 same as Ex. 7, pg. 83;) and about said time the Syracuse Chilled Plow Company and the Pitts agricultural works, both being corporations organized under the laws of the State of New York, executed a similar set of papers to Exhibits 5, 6 and 7, or said corporations assented to said arrangements and joined said other persons, corporations and copartnerships in said undertaking, and that said persons, corporations and copartnerships which then had executed said papers, or assented to such arrangements, constituted substantially all the manufacturers of spring tooth harrows in the United States, except the said Clipper Chilled Plow Company of Elmira, N. Y., which company did not manufacture spring tooth harrows to a large extent.

Said defendant further alleges that such agreements contained in Exhibits 5, 6 and 7, were in reality a continuation of the prior said agreements, Exhibits 1, 2, 3 and 4½, except so far as the latter agreements differed in form from the former, and that upon the execution and delivery of the said agreements, Exhibits 5, 6 and 7, the said National Harrow Company controlled substantially the entire manufacture and sale of spring tooth harrows in the United States.

The defendant further alleges, that all said persons, corporations and copartnerships thereafter received paid-up capital stock of said National Harrow Company of New York or of plaintiff in payment for their patents, applications for patents and rights which
598 were transferred to said National Harrow Company in pursuance of the agreements aforesaid; that said stock was issued to such persons, copartnerships and corporations, or that the portion assigned to each of such corporations was issued to some person in trust for such corporation.

Said defendant further alleges that since the making of the said agreements, Exhibits 5, 6 and 7, the prices of iron and steel, which enter largely into the construction of spring tooth harrows, have fallen in the market and said defendant and other manufacturers of

spring tooth harrows, are able to manufacture said harrows at a less cost than at the time said agreements were made, and defendant herein is desirous that purchasers and users of spring tooth harrows should have the benefit of such lower cost of production, but that defendant, provided Exhibits 5, 6 and 7 are held to be valid, is prevented from giving the benefit of such lower prices to its customers and to the trade generally, bnt it is obliged, provided said exhibits are valid, to sell the harrows manufactured and sold by it at exorbitant prices.

Said defendant further alleges on information and belief that said Exhibits 1, 2, 3 and 4½, and also Exhibits 5, 6 and 7, are void and of no effect for the reason that the same are against public policy and in restraint of trade, and for the reason that many of the parties to the same are corporations, and the said agreements are *ultra vires* and void, and also for the reason that said defendant is a corporation organized under the laws of the State of Michigan, and that a statute of the State of Michigan forbids the making of any contracts, agreements, undertakings or combinations of any kind. That said statute is known as act No. 225, of the Session Laws of the State of Michigan for the Year 1889, is entitled "An act declaring contracts, agreements, understandings, and combinations unlawful, and to provide punishment for those who shall enter into the
599 same or do any act in performance thereof." Approved July 1, 1889.

That said Exhibits 1, 2, 3 and 4½, and also Exhibits 5, 6 and 7, are in violation of and to that end defendant expressly pleads the act of Congress of the United States approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

For further answer to said complaint defendant on information and belief alleges that plaintiff herein was organized about the 17th day of August, 1891, under the laws of the State of New Jersey, entitled "An act concerning corporations," approved April 7, 1873, and amendments thereof and additions thereto.

That the ostensible purpose for which said plaintiff was organized was "making, purchasing and selling manufactured articles, and also of acquiring and disposing of rights to make and use the same," and for no other purpose; but that said plaintiff has never made, purchased, sold or manufactured any article of any name or nature, but that the sole business of said plaintiff has been the acquiring of patent rights and interests therein, and enforcing the same or attempting so to do, and therefore defendant alleges on information and belief, that the real object of said corporation was to form a trust and combination for the sole purpose of monopolizing the manufacture and trade in spring tooth harrows in the United States, and that said Exhibits 1, 2, 3, 4½, 5, 6 and 7, in effect did form a trust and combination, and that said National Harrow Company, plaintiff herein, is the result thereof, and that it was in reality formed for the sole purpose of effecting the absolute control of the manufacture and sale of spring tooth harrows in the United States, and that said

company has in fact substantially accomplished its object, which defendant alleges upon information and belief, is unlawful upon
600 the ground that it is against public policy, and in restraint of trade.

And defendant further alleges that the following-named parties are corporations, and that the acts of such corporations in assenting to said alleged license contracts "A" & "B" were *ultra vires* and void. The names of such corporations are as follows, as defendant is informed and verily believes, viz:

The Farmers' Friend Manufacturing Company, the Walker Manufacturing Company, the Herndeen Manufacturing Company, the McSherry Manufacturing Company, the Eureka Mower Company and the defendant herein.

That at the time of entering into the original agreement between the said National Harrow Company, of Utica, New York, and this defendant and the other parties to said agreement, it was understood and agreed that all of the parties manufacturing harrows under license from the National Harrow Company should pay a uniform royalty of one dollar upon each harrow so manufactured and sold, and licenses were granted to each of said parties upon that basis.

That since said alleged licenses "A" & "B" were granted the National Harrow Company has, in violation of the letter and spirit of said alleged agreement, granted its licenses to certain manufacturing companies to manufacture harrows at lower rates or prices than those fixed in the said alleged licenses "A" & "B" given to this defendant, and has thereby unjustly discriminated against this defendant to the injury of this defendant, so that defendant is unable to continue to pay the license fees agreed to be paid in said alleged licenses "A" & "B" and do business in competition with companies manufacturing under lower licenses.

Defendant further alleges that at some time during the year
601 of 1893, but prior to the first day of August of said year, the Standard Harrow Company of New Jersey, was organized, and that said Standard Harrow Company acquired a majority of the capital stock of the said National Harrow Company of New Jersey, and that said Standard Harrow Company still owns said capital stock and thereby is able to and still does absolutely control the election of directors and officers of said National Harrow Company of New Jersey, and that the officers and directors of said Standard Harrow Company and National Harrow Company of New Jersey are largely made up of the same persons, and that the said Standard Harrow Company is a manufacturer of and dealer in spring tooth harrows to a very large extent, and that their principal place of business is at Utica in the State of New York, and that said Standard Harrow Company is a licensee of said National Harrow Company of New Jersey, and that all its spring tooth harrows are manufactured and sold under said licenses of said National Harrow Company of New Jersey, as defendant is informed and verily believes, that said National Harrow Company has conducted its business, since the first day of August, 1893, and still is conducting its business in a way to favor said Standard Harrow Company, and

against all other persons who manufacture and deal in spring tooth harrows in the United States, and that said plaintiff has allowed other licensees than the defendant herein to sell spring tooth harrows at less than the prices mentioned in the alleged license contracts, Exhibits "A" & "B" and has taken less royalty from said persons than was exacted of defendant herein, as defendant is informed and verily believes, that said defendant is informed and verily believes, said plaintiff has made an agreement with D. M. Osburn & Company, or the Osburn Manufacturing Company of Auburn, N. Y., to allow said company to sell spring tooth har-
602 rows upon a royalty of about fifty cents per harrow, in violation of the terms and conditions of the alleged license contracts Exhibits "A" & "B," and in violation of the by-laws and resolutions of the National Harrow Company of New Jersey, which provide, as defendant is informed and verily believes, that no licensee of said National Harrow Company should be licensed to manufacture or sell harrows at a less royalty than one dollar for each harrow or harrow frame without teeth, all of which was relied upon by defendant when it signed the alleged contracts "A" & "B."

Twelfth. Defendant further alleges upon information and belief that the Pitts Agricultural Works of Buffalo, N. Y., is a licensee of said plaintiff under a license contract similar to the alleged license contracts A and B; that said Pitts agricultural works is a manufacturer and dealer in spring tooth harrows, and that since the first day of August, 1893, it has manufactured and sold and offered for sale several thousand spring tooth harrows, many of which are float spring tooth harrows, also harrow frames without teeth and attachments thereto belonging; that said Pitts agricultural works has sold many of said harrows for less than the prices fixed upon specific harrows by said alleged license contracts A and B, and also as fixed in the license contracts between said plaintiff and said Pitts agricultural works; that said Pitts agricultural works has failed to pay the royalty to said plaintiff on said harrows, and that said plaintiff has taken no proceedings to collect said royalties or to enforce said contracts between it and said Pitts agricultural works, but said National Harrow Company has permitted said Pitts agricultural works to violate the express terms of said license contracts with it, and to effect the public market and the prices at which float spring tooth harrows, harrow frames and attachments thereto, can be sold to the great injury of defendant.

603 Thirteenth. For further answer to the complaint of plaintiff, defendant alleges upon information and belief, that none of the patents referred to and set out in the alleged license contracts A and B cover any of the harrows made or sold by defendant since the first day of August, 1893, nor do they cover any part of said harrows or any attachments thereto.

Defendant further answering said complaint alleges that in the manufacturing and sale of any harrows manufactured or sold by it defendant has not infringed any of the plaintiff's lawful patent

rights in the premises or any of said letters patent set out in said complaint.

Fourteenth. Defendant further alleges that notwithstanding said alleged contracts "Exhibits A and B," and if the same had never been signed by defendant, it would have had the legal right to manufacture and sell and deal in any of the harrows manufactured, sold, or dealt in by it, and also in every part thereof and every device or application thereto in any way attached or belonging.

Fifteenth. Defendant further denies that in its business of manufacturing or selling harrows it has employed any harrows, device, machinery, appliances or any other thing covered by any of the letters patent set forth in said alleged license contracts A and B. And the defendant further denies that by manufacturing, selling and dealing in harrows, harrow frames without teeth, or attachments thereto, it has in any way interfered with or violated the rights of the plaintiff herein.

Sixteenth. Defendant further alleges that it is a corporation duly incorporated under the general statutes of the State of Michigan providing for the organization of corporations, and as a defense to the causes of action set out in the complaint herein, defendant pleads the statutes of the State of Michigan providing that a corporation shall not enter into any agreement, combination or trust with any other corporations or companies, and which said stat-
604 ute is known as act No. 225 of the Session Laws of the State of Michigan for the Year 18— and is entitled "An act declaring contracts, agreements, undertakings and combinations unlawful, and to provide punishment for those who shall enter into the same or do any act in performance thereof" approved July 1, 1889.

Seventeenth. Defendant for further answer alleges on information and belief, that said plaintiff is a corporation organized under the general law of the State of New Jersey, providing for the organization of corporations, and that it was organized for the purpose of making, purchasing and selling manufactured articles and also of acquiring and disposing of rights to make and use the same, but that said plaintiff has never manufactured or made any articles of any kind, although, it has had a corporate existence for more than three years, as defendant is informed and verily believes, and that its corporate rights have therefore ceased.

Eighteenth. For a further answer to the complaint herein defendant denies each allegation thereof not hereinbefore admitted, specifically denied or otherwise answered.

COOKINHAM & SHERMAN,
Defendant's Attorneys, 21 *Mann Building, Utica, N. Y.*

STATE OF MICHIGAN, } ss:
County of Ingham, }

A. O. Bement being duly sworn, says that he is the president of the corporation of Bement & Sons, the defendant herein, and that the reason defendant does not make this verification is that it is a corporation. Deponent further says that he has read the forego-

ing answer and knows the contents thereof, that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

A. O. BEMENT.

605 Subscribed and sworn to before me this 3d day of November, 1894.

CLARA A. CARROLL,
Notary Public, Ingham County, Mich.

STATE OF MICHIGAN, } ss :
County of Ingham, }

I, James Blackmore, clerk of the county of Ingham and clerk of the city court for said county, which is a court of record having a seal, do hereby certify that Clara A. Carroll, whose name is subscribed to the certificate of the annexed affidavit, and therein written, was at the time of taking the same a notary public in and for said county, duly commissioned and qualified, and duly authorized to take the same; and further, that I am acquainted with the handwriting of such notary public, and verily believe the signature to the said certificate is genuine. I further certify that said instrument is executed according to the laws of this State.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county at Mason, this third day of November, 1894.

[L. S.] JAMES BLACKMORE, *Clerk.*

At a term of the appellate division of the supreme court of the State of New York, in and for the fourth department, held at the city of Rochester in the county of Monroe on the 2nd day of June, 1896.

Present: Hon. Geo. A. Hardin, presiding justice.
" David L. Follett,
" William H. Adams,
" Manly C. Green,
" Hamilton J. Ward. } Associate justices.

606 NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellant.

Upon reading and filing the affidavit of Henry J. Cookinham, sworn to the — day of May, 1896, and the affidavit of Edwin H. Risley in opposition thereto, verified the first day of June, 1896, and after hearing Henry J. Cookinham of counsel for the appellant in favor of the motion, and William P. Quin of counsel for the respondent, in opposition thereto, it is,

Ordered as follows:

First. That the decision of this case be suspended, and the case be sent back to the referee to resettle the same, and to attach to the resettled case, his certificate that the case as resettled contains all of

the evidence given and proceedings had on the trial and hearing of the case before him.

Second. The foregoing relief is granted, however, upon the conditions hereinafter stated; that is to say: The appellant shall, within fifteen days from the entry of this order, pay to the attorneys for the respondent, the sum of $177.70, the same being the costs and disbursements of the respondent on this appeal to date, together with $10.00 costs of this motion, amounting in all to the sum of $187.70. The appellant shall further pay to the referee the fees for resettling the case, upon the signing of the same by the referee.

"The appellant's attorney shall make and serve upon the respondent's attorneys, within thirty days from the entry of this order, a new case and exceptions containing all the evidence given and proceedings had before the referee upon the hearing of the case," and upon the service of the new proposed case, the respondent
607 shall have twenty days' time in which to propose amendments thereto, and the proposed case and amendments shall then be settled before the referee, upon five days' notice in writing served by either party upon the other, and when the case is settled by the referee and his certificate is attached thereto that the record as settled contains all the evidence and proceedings had before him the same shall be printed and filed with the clerk of Oneida county within five days from completion of the printing, and within five days after the printing of the case as resettled is completed, the appellant shall serve three copies of the same upon the respondent's attorneys.

Third. It is further ordered that in printing the case, in addition to the judgment-roll, the appellant shall cause to be printed and inserted in the printed case, the pleadings in their amended form.

Fourth. It is further ordered that this case be brought on for reargument in this court according to the law and practice in such case made and provided.

Fifth. It is further ordered that neither party shall tax against the other the expense- of this appeal to this date, which are taxed herein, in the event that the appellant avails itself of the benefits of this order.

Sixth. It is further ordered that in the event of the failure on the part of the appellant to comply with any of the conditions mentioned in this order, then this motion is denied with $10.00 costs, and the order suspending the decision is vacated and the case will then be decided on the record as it now stands.

[L. S.] NEWELL C. FULTON, *Clerk.*

(Title of Cause.)

The defendant in the above-entitled cause hereby stipulates to comply in all things with the annexed order.

Dated, June 24, 1896.

COOKINHAM, SHERMAN & MARTIN,
Attorneys for Defendant.

608 Supreme Court, Appellate Division.

NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellant.

Insert order of the appellate division, dated June 2, 1896, after line 22, page 577.

The case and exceptions on appeal herein is settled by me as appears in the foregoing record, and I hereby order and direct the clerk of Oneida county to file the case as settled and attach the same to the judgment-roll.

August 4, 1896.

W. A. MATTESON, *Referee.*

I do hereby certify that pursuant to an order of the appellate division of the supreme court, granted on the 2nd day of June, 1896, which order is contained in the foregoing record, the counsel for the respective parties to this action appeared before me on the 1st day of August, 1896, for the purpose of settling the proposed case and exceptions herein on appeal.

Counsel for the appellant presented as his proposed case and exceptions, one of the printed appeal books containing the case and exceptions as heretofore settled by stipulation of the parties, which stipulation is found at folio 1730 of the foregoing record, and dated Sept. 16, 1895.

The proposed case and exceptions so presented by appellant's counsel is the foregoing record down to folio 1731. Attached to said proposed case and exceptions was a certificate in the following words, to wit:

"The foregoing case and exceptions contains all the evidence and proceedings had in the case material to the questions raised on this appeal and upon the points sought to be reviewed thereon."

609 Counsel for the appellant asked that the case and exceptions be settled as proposed, and that I sign the said certificate.

Respondent's counsel asked by way of amendment that the proposed certificate above set out, be stricken out and that in the place thereof I certify that the case and exceptions does not contain all the evidence and proceedings had upon the trial of the cause.

Respondent's counsel urged before me that the proposed case and exceptions *was* the same in all respects as the case and exceptions upon which the cause was argued in the appellate division, and that a large amount of evidence and proceedings taken on the trial of this cause had been omitted therefrom, and that appellant's counsel had not complied with the order of the appellate division, in that he had proposed the case and exceptions exactly as it had been previously settled, and had not inserted or made any attempt to insert the evidence and proceedings so omitted.

To this appellant's counsel replied, that while the proposed case and exceptions *was* the same as the case presented to the appellate division, nevertheless it did contain all the evidence and proceed-

ings had in the case material to the questions raised on this appeal and the points sought to be reviewed thereon, and further stated that if respondent's counsel would point out what of the omitted evidence and proceedings he desired added to the case, he, appellant's counsel, would add it and print it.

Respondent's counsel replied that the evidence and proceedings omitted were material to the questions in the case, and that the order of the appellate division required the appell*ate* to prepare and serve a new case and exceptions containing all the evidence and proceedings taken on the trial, and that in this respect the order had not been complied with, and that appell*ate*'s counsel
610 could not put the burden upon the respondent or his counsel, of preparing amendments to point out what had been omitted, or of putting the case in form to entitle the appellant to the certificate he asked for.

In a general way, my attention and that of the appellant's counsel was called to considerable evidence and proceedings which it was claimed had been omitted, but appellant's counsel insisted they were immaterial and asked me to so decide.

The order of the appellate division seems to require a case settled containing all the evidence and proceedings taken, and that the certificate should so state.

I cannot truthfully certify that the foregoing case and exceptions as settled contains all the evidence and proceedings taken before me on the trial of this cause, and I therefore decline to do so.

W. A. MATTESON, *Referee.*

Supreme Court, Appellate Division, Fourth Department.

NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellants.

Whereas, on the 2nd day of June, 1896, this court made an order suspending the decision of this case, and sending the same back to the referee to resettle the same, with directions to attach to the resettled case, his certificate that the case as resettled contained all of the evidence given and proceedings had on the trial and
611 hearing of the case before him; the order also directed the payment by the appellant to the respondent of certain specified costs, and further directed that "the appellant's attorneys shall make and serve upon the respondent's attorneys within thirty days from the entry of this order, a new case and exceptions containing all of the evidence given and proceedings had before the referee upon the hearing of the case."

That afterwards the appellant's attorneys paid the costs and served upon the respondent's attorneys the same printed case heretofore used when this case was argued and submitted to this court for its decision, with the following changes, to wit: On page 456 of the said printed case the following was inserted at the foot thereof: "The objections made to the evidence taken on the commission were re-

newed when the depositions were read, and the referee ruled on them, and exceptions were taken as now appears in the case." The certificate of the referee to said printed case was cut out and it was proposed to print the pleadings as amended, as provided for in the order.

The appellant also proposed the following statement:

"The foregoing case and exceptions contain all the evidence and proceedings had in the case material to the questions raised on this appeal and upon the points sought to be reviewed thereon."

That afterwards the respondent served amendments to such proposed case, in which it asked to cancel the foregoing proposed certificate or statement of the appellant, and in addition thereto proposed a form of certificate for the referee to certify to when he settled the case.

That afterwards the case was settled before the referee and his certificate given as contained in this printed record, and

Whereas, the appellant was not satisfied with the record as settled by the referee; now, for the purpose of settling said case and
612 getting it in shape so that it can be finally submitted at the next term of this court, it is agreed as follows:

First. That the foregoing record as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee, material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows:

1. The validity of the contracts A and B attached to the complaint.

2. Whether or not the acts of the defendant in executing the contracts A and B were and are *ultra vires*.

3. Whether or not this plaintiff has lost its right to sue by not commencing to make the manufactured articles prior to the bringing of this suit.

4. Whether or not the contracts A & B are valid under the "act of Congress approved July 2, 1890, chapter 647 of the first session of the 51st Congress."

5. Whether or not the "Lever," "Lansing" and "Reliance" harrows are and were, and are and were known to the trade as "float spring tooth harrows."

6. Whether or not the five dollars ($5.00) provided for as liquidated damages in contracts A & B *is* liquidated damages or whether it *is* a penalty.

7. As to the number of harrows sold in violation of the contracts and as to the amount of damages.

8. The exceptions taken to the evidence.

Second. It is stipulated that the exceptions taken by the appellant to the rulings by the referee in receiving or rejecting evidence, are waived in the court of appeals, in the event of the judgment being reversed in this court on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's evidence, and this clause of the stipulation is to op-

erate upon the present appellant in the court of appeals in
613 the event of the appeal by the respondent from the judgment of reversal in this court to the court of appeals.

Third. It is stipulated that the following additions to the present printed cases shall be made at the end of line 3, folio 545, as follows, viz:

It is conceded that the witness, Robert E. King whose evidence is not printed in full in this record, testified that between February 28, 1893, and the commencement of this suit, he purchased from the defendant and the defendant sold and delivered to him, five "Steel King" harrows, at less prices and on more favorable terms of payment than those fixed in the license contract and that Mr. King afterwards paid for said harrows at a reduced price.

Fourth. It is further stipulated that the printed case be amended by inserting at end of line 7, folio 525, as follows:

"Q. Are you familiar with what is known as the Reed patent (No. 201,946)?

A. I am.

Q. Are you familiar with the first claim of that patent?

A. I am.

Q. Are the elements set forth in claim 1 of that patent embraced in the construction of the Plaintiff's 'Exhibit Ajax Harrows'?

Mr. COOKINGHAM: I object to it as incompetent, immaterial and irrelevant, and further that the question of the infringement or validity of a patent, cannot be questioned in a State court.

Question withdrawn."

Fifth. It is hereby stipulated that the printed record be amended at the end of line 6, at folio 1467, by inserting the following:

"Cross-examination of WARREN M. BRINKERHOFF continued by Mr. RISLEY:

Q. Mr. Brinkerhoff, were all the harrows which the
614 National Harrow Company voted to grant licenses to build, covered and embraced in the patents set forth in the contract in suit?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant, not cross-examination, reopening plaintiff's case and not the subject upon which a hypothetical question could be founded and the witness — not competent to answer such questions as this, that the defendant has given no proof as to whether the patents embraced in the license contracts in form cover construction of harrows or not.

Objection sustained by the referee, and the evidence excluded upon the ground that the defendant had given no proof tending to show that the patents set forth in the contracts in suit did not cover the construction of the harrows licensed by the plaintiff.

The plaintiff excepted."

Sixth. The case containing the amended form of pleadings and the certificate of the referee, as hereby amended, is agreed to be the case and exceptions on this appeal.

Seventh. It is stipulated that the printed record shall forthwith be filed in the appellate court, and the case be submitted on the 12th day of October, 1896, at the opening of the court. Appellant's brief to be served by 12 m., October 8, and respondent's brief by October 10, 5 p. m. Appellants to serve printed case on or before September 26, 1896.

September 18, 1896.

COOKINHAM, SHERMAN & MARTIN,
Appellant's Attorneys.
RISLEY, ROBINSON & LOVE,
Respondent's Attorneys.

I hereby order the above printed case and exceptions, as
615 settled and agreed upon by the parties, filed in the Oneida county clerk's office.

Dated September 26, 1896.

W. A. MATTESON, *Referee.*

It is hereby stipulated that the above is a true and correct copy of the original case and exceptions herein filed in the Oneida county clerk's office.

Dated September 28, 1896.

COOKINHAM, SHERMAN & MARTIN,
Attorneys for Appellant.
RISLEY, ROBINSON & LOVE,
Attorneys for Respondent.

616 At a term of the appellate division of the supreme court of the State of New York, in and for the fourth judicial department at the city of Rochester, on the 22d day of September, 1897.

Present: Hon. George A. Hardin, presiding justice; Hon. David L. Follett, Hon. William H. Adams, Hon. Manley C. Green, Hon. Hamilton Ward, associate justices.

THE NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellant.

The above-named defendant and appellant in this action having appealed to the appellate division of the supreme court from a judgment of the supreme court, entered in the office of the clerk of the county of Oneida, on the 11th day of June, 1895, and the said appeal having been submitted by Messrs. Cookinham, Sherman & Martin, of counsel for the appellant, and also submitted by Messrs. Risley, Robinson & Love, of counsel for the respondent, and due deliberation having been had thereon.

It is hereby ordered and adjudged (stricken out by order of court), that the judgment so appealed from be and the same is hereby reversed and a new trial ordered with costs to abide the event.

617 Opinion by Follett, J. All concur except Hardin, P. J., not voting.

[L. S.] NEWELL C. FULTON, *Clerk.*

Supreme Court, Appellate Division, Fourth Judicial Department.

CLERK'S OFFICE, ROCHESTER, N. Y.

I, Newell C. Fulton, clerk of the appellate division of the supreme court in the fourth judicial department, do hereby certify that the following is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding and entered in my office on the 22nd day of September, 1897, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Rochester, this twenty-third day of September, 1897.

[L. S.] NEWELL C. FULTON, *Clerk.*

Supreme Court.

NATIONAL HARROW COMPANY, Respondent,
against
E. BEMENT & SONS, Appellant.

The above-named defendant, E. Bement & Sons, having appealed to the appellate division of the supreme court for the fourth
618 department, from the judgment entered in the above-entitled action, in the Oneida county clerk's office, on the 11th day of June, 1895, in favor of said National Harrow Company and against E. Bement & Sons, adjudging the contracts sued upon to be valid contracts, among other things and for $22,520.23, and said appeal having been duly brought to hearing at a term of said court held in March, 1896, and after hearing H. J. Cookinham, Esq., of counsel for said appellant, and William P. Quin, Esq., and E. H. Risley, Esq., of counsel for the respondent, and the said court having made an order reversing said judgment and ordering a new trial with costs to abide the event.

Now, therefore, on motion of Cookinham, Sherman & Martin, attorneys for appellant, it is

Ordered, adjudged and decreed (stricken out by order of the court), that said judgment so entered in the Oneida county clerk's office as aforesaid be, and the same is hereby, in all things reversed and a new trial ordered with costs to abide the event.

Judgment-roll filed, and judgment signed, entered and docketed this 27th day of September, 1897, at 2.10 p. m.

GEO. D. FRANK, *Dep. Clerk.*

At a term of the appellate division of the supreme court of the State of New York, in and for the fourth judicial department, held at the city of Rochester on the 24th day of January, 1898.

619 Present: Hon. George A. Hardin, presiding justice; Hon. David L. Follett, Hon. William H. Adams, Hon. Manley C. Green, Hon. Hamilton Ward, associate justices.

THE NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellant.

The above-named plaintiff and respondent having duly moved this court for an order to amend an order of this court of September 22, 1897, and the judgment entered thereon on September 27, 1897, in the manner specified in the said notice of motion and as herein stated.

And the said application of the plaintiff and respondent having come on duly to be heard before the justices of this court, and after hearing Edwin H. Risley, Esq., of counsel for the plaintiff, and respondent, in support of the said application, and Henry J. Cookinham, Esq., of counsel for the defendant and appellant, in opposition thereto.

Now, therefore, on all the papers, pleadings and proceedings herein, and on motion of Risley & Love, attorneys for the plaintiff and respondent, it is hereby

Ordered that the order of this court, of September 22, 1897, be amended by striking therefrom the words: "That the judg-
620 ment so appealed from be, and the same is hereby, reversed and a new trial ordered, with costs to abide the event," and by inserting the words, "that the judgment so appealed from be, and the same hereby is, reversed on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's evidence, and a new trial is ordered with costs to abide the event." And it is further

Ordered that the said judgment entered upon said order of September 27, 1897, be amended by striking therefrom the words: "That said judgment *be* entered in the Oneida county clerk's office, as aforesaid, be, and the same is hereby, in all things reversed and a new trial ordered with costs to abide the event," and inserting in the place thereof the words, "that the judgment so appealed from be, and the same hereby is, reversed on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's evidence, and a new trial is ordered with costs to abide the event."

[L. S.] NEWELL C. FULTON, *Clerk.*

Supreme Court, Appellate Division, Fourth Department, Rochester, N. Y.

I, Newell C. Fulton, clerk of the appellate division of the supreme court in the fourth judicial department, do hereby certify that the annexed order is a true copy of the original, now on file in this office and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Rochester, this 24th day of January, 1898.

[L. S.] NEWELL C. FULTON, *Clerk.*

621 New York Supreme Court.

THE NATIONAL HARROW COMPANY, Pl'ff and App'l't,
vs.
E. BEMENT SONS, Def't and Resp't.

GENTLEMEN: Take notice, that the plaintiff herein appeals to the court of appeals from the judgment of the appellate division of the supreme court herein, entered in the clerk's office of the county of Oneida, on the 27th day of September, 1897, (and from the order on which said judgment was entered), as amended by order of the appellate division of the supreme court January 24, 1898, and filed in said county clerk's office on January 26th, 1898, said order and judgment reversing a judgment for the plaintiff and ordering a new trial. The appellant intends to bring up for review upon such appeal each and every part of said order and judgment.

And the appellant hereby stipulates that upon affirmance, judgment absolute shall be rendered against it.

Dated Utica, N. Y., January 27, 1898.

Yours, &c., THE NATIONAL HARROW CO.
RISLEY & LOVE,
Plaintiff's Attorneys.

Office and post-office address, Herald building, Utica, New York.

To the clerk of the county of Oneida and to Cookinham, Sherman & Martin, attorneys for the defendant, No. 71 Genesee street, Utica, N. Y.

622 STATE OF NEW YORK, } *ss.:*
Oneida County Clerk's Office, }

I, George D. Frank, clerk of the said county and of the supreme and county courts therein, the same being courts of record, do hereby certify that I have compared the annexed copy of record and endorsements thereupon with the original thereof on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts at the city of Utica, this 28th day of Jan. 1898.

[L. S.] GEO. D. FRANK, *Clerk.*

Supreme Court, Fourth Appellate Division.

THE NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellant. } No. 369.

Argued October 15, 1896; decided October, 1897.

Hardin, P. J.; Follett, Adams, Green, and Ward, associate justices.

Appeal from a judgment entered on the report of a referee for $20,985, damages, and $1,535.23, costs—total, $22,520.23—
623 and adjudging that defendant specifically perform certain contracts and be restrained from violating them.

H. J. Cookinham, for the appellant.
William P. Quin and Edwin H. Risley, for the respondent.

FOLLETT, *J.:*

This action was begun October 10, 1894, to compel the defendant to account for harrows sold pursuant to two contracts called licenses, dated April 1, 1891, and to recover damages for sales alleged to have been made in violation of the licenses, and for a judgment restraining the defendant from making further sales in controvention of such licenses. In effect, the action is to compel the defendant specifically to perform the contracts entered into between the litigants April 1, 1891, and to recover damages accruing before the commencement of the action for the violation of the contracts.

Immediately before September, 1890, there were about twenty firms and corporations in the United States engaged in the manufacture of float spring tooth harrows under various patents. Among several of those firms and corporations litigations had arisen over alleged infringements. On the second of September, 1890, six of these manufacturers, the defendant not being one, organized a corporation under the laws of this State, known as the National Harrow Company, having its principal office at Utica, N. Y. This corporation though nominally organized for the purpose of manufacturing and dealing in harrows, never engaged in manufacturing or selling them, and, so far as it appears, had no cash capital, but its stock was issued for patents assigned to it. By an agreement executed
624 by the defendant and other manufacturers, it was agreed that they would assign the patents which they severelly held, to the National Harrow Company, and receive therefor their value in stock, and in case the manufacturers should be unable to agree as to the value of their respective patents, it was provided that their value should be ascertained by three arbitrators and that each manufacturer assigning patents should receive stock in the National Harrow Company equal in amount to the value placed on the patent by the arbitrators. Under this arrangement eighty-five patents were assigned to the National Harrow Company of New York, for which stock was issued to the assignors at the value appraised or at the value agreed on. By the contracts entered into between the

manufacturers and the National Harrow Company, it is apparent that this corporation was formed solely for the purpose of receiving assignments of the various patents under which the manufacturers were engaged in making harrows, and to grant licenses to the various manufacturers to continue to make the same kind of harrows they had previously made, and to fix the price at which their harrows should be sold. By the terms of these contracts it appears conclusively that it was the purpose of the combination to restrict the right of the several manufacturers who should receive licenses, to the manufacture of the same kind of harrows which they previously made. In June, 1891, the defendant's corporation organized under the laws of the State of Michigan, and the National Harrow Company entered into two contracts dated April 1, 1891, by which the National Harrow Company granted to the defendant the right to manufacture at Lansing, in the State of Michigan, and to sell throughout the
625 United States, four kinds of float spring tooth harrows, harrow frames without teeth, and attachments applicable thereto, "which apply to and embrace the peculiar construction employed by E. Bement & Sons during the term of such patents, or any or either thereof, applicable to and embracing such construction." (Folios 30 & 59.) The four kinds of harrows are described in Schedule A, and samples of them were left in the possession of the National Harrow Company. By one of the provisions of these contracts the defendant was authorized to make and sell the same kind of harrows it had been accustomed to manufacture under its patents before they were assigned, without being exposed to claims made for infringements under patents originally issued to others. The same kind of licenses or contracts was issued to other manufacturers, each manufacturer being authorized to make the same kind of harrow it had formerly made, and no others.

By the first subdivision of these contracts the defendant bound itself to pay to the National Harrow Company, as royalties, the sum of one dollar for each and every float spring tooth harrow, or float spring tooth harrow frame, without teeth, sold by it pursuant to the terms of the contracts or licenses. By the second and fourth subdivisions of the contracts it is provided that the defendant shall not sell float tooth spring harrows, float spring tooth harrow frames without teeth, or attachments applicable thereto, manufactured under the *the* contracts, and shall not ship them to others to be sold at a less price, or on more favorable terms of payment, than are set forth in Schedule B of the contracts, which schedule fixes the prices at which harrows shall be sold and provides that a discount
626 of forty-three per cent. may be allowed on the prices fixed on harrows, frames and teeth, sold in thirteen of the United States, and that in all other States a discount of forty-five per cent. may be allowed on sales. By the fourth subdivision the National Harrow Company reserves the right to decrease the selling prices of harrows and to make the terms of payment and delivery more favorable to the purchasers. By the sixth subdivision of the contracts it is provided that the defendant shall not directly or indirectly manufacture or sell any float spring tooth harrows, or float

spring tooth harrow frames, without teeth, or attachments applicable thereto, other than those it was authorized to manufacture by the terms of the contracts, except such harrows as it may manufacture for any other licensee of the National Harrow Company, and then that it shall manufacture only such harrows as such other licensee shall be licensed by the National Harrow Company to manufacture and sell. By the seventh subdivision of the contracts it is provided that the defendant shall pay to the National Harrow Company five dollars for every float spring tooth harrow, float spring tooth harrow frame, without teeth, or attachments applicable thereto, which shall be sold contrary to the strict terms of the licenses, which sum is agreed on as the liquidated damages for such violation of the contracts. By the ninth subdivision of the contracts the defendant is prohibited from licensing any other person, firm or corporation to manufacture or sell any float spring tooth harrows, float spring tooth harrow frames without teeth, or attachments applicable thereto, and by the tenth subdivision it is provided that the defendant shall not manufacture or sell, directly or indirectly, any different style
627 of float spring tooth harrow, float spring tooth harrow frames without teeth, or attachments applicable thereto, than those described in Schedule A, and samples of which were deposited with the National Harrow Company. The same form of contract or license was issued to all the licensees by the National Harrow Company. After these licenses or contracts had been granted to the defendant and other manufacturers, the parties in interest organized a corporation under the laws of the State of New Jersey, under the name of the National Harrow Company, and the New York corporation of the same name assigned to the New Jersey corporation all of its patents, contracts and property, except about one thousand dollars, and received therefor stock to the amount of the value of the patents as fixed, which stock was afterwards distributed among the manufacturers, each manufacturer receiving the same number of shares in the new corporation that it held in the New York corporation. For some time the defendant made reports of the harrows which it sold, and paid the royalty according to the terms of the contracts, but subsequently it, as is found by the referee, refused to make reports of the harrows manufactured and to pay the royalty prescribed by the contracts. Because of this alleged violation of the contracts this action was brought to recover of the defendant the stipulated damages of five dollars for each harrow sold by it and not reported, and also to compel it in the future specifically to perform the contracts.

It is apparent that the plaintiff and its predecessor, the National Harrow Company of New York, were not organized for the purpose of manufacturing or dealing in float spring tooth harrows,
628 but for the purpose of bringing the manufacturers of such harrows under the control of a single corporation having the power to fix the prices at which such harrows should be sold, and to limit the manufacturing of harrows to the kinds in use on the first day of April, 1891, and to limit each licensee of the National Harrow Company to the manufacture of such harrows as the licensee had made

and sold under his patents prior to their assignment, unless the licensee should become a sublicensee of some other licensee of the National Harrow Company. The contracts entered into by the manufacturers preliminary to the organization of the New York corporation disclose these purposes, which are sought to be carried out by the contracts or licenses A and B, dated April 1, 1891, copies of which are attached to the complaint, and on which this action is brought.

It is contended that because the contracts do not authorize the plaintiff to raise the prices of harrows above those fixed in the contracts, but simply authorizes the plaintiff to decrease the prices at at which harrows shall be sold, it is not a provision void as against public policy. By these contracts the prices of harrows are fixed, but the defendant is authorized to sell them at from forty-three to forty-five per cent. less than the prices fixed. A contract fixing the prices of harrows at more than forty per cent. above their value or selling prices and authorizing the licensor to reduce, but not to increase the prices, as effectually controls the price for all practical purposes as though the power to increase had been expressly reserved to the plaintiff. It would hardly be practical to fix the prices at more than forty-three or forty-five per cent. above the selling prices of the harrows. The case shows that by reason of the fall
629 in prices of materials and labor, harrows could be manufactured at the date of the trial of this action for sixty-eight per cent. of their cost in April, 1891, but the defendant and all other licensees of the plaintiff are by their contracts prohibited from lowering the prices, except by the consent of the plaintiff.

It seems to me that the provisions of the contracts authorizing, in effect, the plaintiff to fix the prices at which harrows shall be sold during the existence of these patents, and providing that the defendant shall not directly or indirectly manufacture or sell any float spring tooth harrows, or float spring tooth harrow frames without teeth, or attachments applicable thereto, other than those it is authorized to manufacture by the terms of the contracts, are void as against public policy. No matter what improvements are made in float spring tooth harrows, this defendant and all other licensees of the plaintiff are prohibited from adopting them, and they are all confined to the manufacture and sale of float spring tooth harrows covered by the eighty-five patents specified in the contracts. These provisions not only stifle competition between the plaintiff's licensees, but effectually prevent them from attempting to make any improvement in harrows.

That combinations for the purpose of limiting the supply and fixing the prices of articles of general use during long periods, are unlawful, has been so often decided as not to require the citation of authorities. (People *v.* Milk Exchange, 145 N. Y., 267; Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y., 558, Leonard *v.* Poole, 114 *id.*, 371.)

By section 168 of the Penal Code, any combination to injure
630 trade or commerce is a misdemeanor. This section is a substitute for section 8, title 6, chapter 1, part 4 of the Revised

Statutes (2 R. S. 691), which was repealed by chapter 593 of the Laws of 1886, section 1, paragraph 4. When the transactions occurred out of which this action arose, section 7, of chapter 564 of the Laws of 1890—the stock-corporation law—provided:

"SEC. 7. Combinations prohibited.—No stock corporation shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

By chapter 354 of the Laws of 1897, the section was amended so that it now reads as follows:

"SEC. 7. Combinations abolished.—No domestic stock corporation and no foreign corporation doing business in this State shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

The licenses or contracts A and B were entered into by the National Harrow Company of New York, and being designed "for the creation of a monopoly" and to effect "the unlawful restraint of trade" are void under the section last quoted as being beyond the power of the corporation. The words "necessary of life," do not control the entire section, but only limit and control the words following the last disjunctive in the section. The section is a disjunctive one, and prohibits corporations from combining to accomplish three things: (1) "Creation of a monopoly;" (2) "the unlawful restraint of trade," and (3) "the prevention of competition in any necessary of life."

631 The plaintiff, the successor of the New York corporation, stands in the shoes of its predecessor in respect to these contracts, and they being void when entered into, are void in the hands of the plaintiff.

The contention that a float spring tooth harrow is not an instrument of such general use and utility as to render combinations formed to control its price and production violative of public policy, cannot be maintained. A harrow is an implement as important and as generally used by farmers as a plow, and is quite as necessary for the proper cultivation of land as any other agricultural implement, and is in use on every properly cultivated farm. Float spring tooth harrows have come into general use and have largely superseded the old-fashioned square and three-cornered harrows or drags having peg teeth, and I think it needs no argument to show that a combination formed for the purpose of controlling the prices, limiting the production, preventing competition among manufacturers, and also preventing further improvement in them, is contrary to public policy as declared by the statutes of this State and by a long line of decisions in this and other jurisdictions. Indeed, it has been held in three cases in which this plaintiff and its predecessor, the New York corporation of the same name, were parties that a combination to restrain the production and control the prices of these harrows was contrary to public policy and void. (Strait *v.* National Harrow Co., 18 N. Y., Supp. 224; National Harrow Co., *v.* Quick, 67 Fed. Rep., 131; National Harrow Co. *v.* Hench, 76 *id.*, 667.)

It is urged by the learned counsel for the plaintiff, that because float spring tooth harrows are patented articles, therefore, the
632 patentees or their assignees may combine to limit the production or regulate the prices of the articles. This argument is based upon the theory that all patents during their existence create a monopoly of the articles patented, and that the owner of the patent may manufacture or refuse to manufacture the article and fix his own price upon it. It was said in Heaton Peninsular Button Fastener Co., *v.* Eureka Specialty Co., (47 U. S. Circuit Appeals, 166), that "the right of a patentee is after all but a property right and subject as is all other property, to the general law of the land. We may also concede that contracts respecting the use of inventions and discoveries are like all other contracts, subject to the limitations imposed by definite principles of public policy."

It seems to me that the contention that all the telephone patentees could assign their patents to a single corporation, for the purpose of limiting the prices at which instruments should be sold, and preventing all competition in their production, cannot be sustained on the ground that their rights being protected by patents are, in effect, monopolies created by the Government, and that a combination of all these smaller and legalized monopolies into one great monopoly would not be against public policy. This question was also considered and held against the plaintiff in National Harrow Co. *v.* Hench, (76 Fed. Rep. 667.)

The position that because the defendant, being a party to these contracts which it now seeks to have declared illegal, is estopped from questioning their validity, cannot be maintained. That question was considered and determined adversely to the plaintiff's contention in Leonard *v.* Poole, (114 N. Y. 371).

633 I am of the opinion that the contracts sought to be enforced are void as against public policy because by them it is sought to control for a long period of years, during the life of the patents, the prices of float spring tooth harrows, and to limit during the same period the manufacturers licensed by the plaintiff and by its predecessor to the production of float spring tooth harrows described in the licenses, and because the effect of the contracts is to prevent further improvement in harrows by the licensees of the plaintiff or of its predecessor. This contention is supported by the three cases above cited, in which the plaintiff and its predecessor were parties.

All concur except Hardin P. J. not voting.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

634 At a term of the appellate division of the supreme court of the State of New York, in and for the fourth judicial department at the city of Rochester, on the 22nd day of September, 1897.

Present: Hon. George A. Hardin, presiding justice; Hon. David L. Follett, Hon. William H. Adams, Hon. Manly C. Green, Hon. Hamilton Ward, associate justices.

THE NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellant.

The above-named defendant and appellant in this action having appealed to the appellate division of the supreme court from a judgment of the supreme court entered in the office of the clerk of the county of Oneida, on the 11th day of June, 1895, and the said appeal having been submitted by Messers. Cookinham, Sherman & Martin of counsel for the appellant, and also submitted by Messers. Risley, Robinson & Love of counsel for the respondent, and due de-
635 liberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby reversed and a new trial ordered with costs to abide the event.

Opinion by Follett, J. All concur except Hardin P. J. not voting.

[SEAL.] NEWELL C. FULTON, *Clerk.*

Supreme Court, Appellate Division, Fourth Judicial Department.

CLERK'S OFFICE, ROCHESTER, N. Y.

I, Newell C. Fulton, clerk of the appellate division of the supreme court in the fourth judicial department, do hereby certify that the following is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding and entered in my office on the 22nd day of September, 1897, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Rochester, this twenty-third day of September, 1897.

[SEAL.] NEWELL C. FULTON, *Clerk.*

636 Supreme Court.

NATIONAL HARROW COMPANY, Respondent,
against
E. BEMENT & SONS, Appellant.

The above-named defendant E. Bement & Sons having appealed to the appellate division of the supreme court for the fourth department from the judgment entered in the above-entitled action in the Oneida county clerk's office on the 11th day of June, 1895, in favor of said National Harrow Company and against E. Bement & Sons, adjudging the contracts sued upon to be valid contracts among other things and for $22,520.23, and said appeal having been duly brought to hearing at a term of said court held in March, 1896, and after hearing H. J. Cookinham, Esq., of counsel for said appellant and William P. Quin, Esq., and E. H. Risley, Esq., of counsel for the respondent, and the said court having made an order reversing said judgment, and ordering a new trial with costs to abide the event.

637 Now, therefore, on motion of Cookinham, Sherman & Martin, attorneys for appellant, it is

Ordered, adjudged and decreed that said judgment so entered in the Oneida county clerk's office, as aforesaid be, and the same is hereby in all things reversed and a new trial ordered with costs to abide the event.

Judgment-roll filed, and judgment signed, entered and docketed this 27th day of Sept. 1897, at 2.10 p. m.

GEO. D. FRANK, *Dep. Clerk.*

638 N. Y. Supreme Court.

THE NATIONAL HARROW COMPANY, Pl'ff & App'l't,
vs.
E. BEMENT & SONS, Def't & Resp't.

GENTLEMEN: Take notice, that the plaintiff herein appeals to the court of appeals from the judgment of the appellate division of the supreme court, herein entered in the clerk's office of the county of Oneida, on the 27th day of September, 1897, and from the order on which said judgment was entered) as answered by order of the appellate division of the supreme court, January 24, 1898, & filed in said county clerk's office on January 26, 1898, said order and judgment reversing a judgment for the plaintiff & ordering a new trial.

The appellant intends to bring up for review upon such appeal each & every part of said order and judgment, and the appellant hereby stipulates that upon affirmance, judgment absolute

639 shall be rendered against it.

Dated Utica, N. Y., Jan'y 27, 1898.

Yours &c., THE NATIONAL HARROW CO.
RISLEY & LOVE, *Pl'ff's Att'ys.*

Office and post-office address, Herald bldg., Utica, New York.

To the clerk of the county of Oneida and to Cookinham, Sherman & Martin, attorneys for the def't, No. 71 Genesee St., Utica, N. Y.

[Endorsed:] N. Y. supreme court. The National Harrow Company pl. & app. *vs.* E. Bement & Sons, def't & resp't. Notice of appeal. Risley & Love, pl'ff's attorneys Herald bldg., Utica, N. Y.

640 At a term of the appellate division of the supreme court of the State of New York, in and for the fourth judicial department held at the city of Rochester on the 24th day of January, 1898.

Present: Hon. George A. Hardin, presiding justice; Hon. David L. Follett, Hon. William H. Adams, Hon. Manly C. Green, Hon. Hamilton Ward, associate justices.

THE NATIONAL HARROW COMPANY, Respondent,
vs.
E. BEMENT & SONS, Appellant.

The above-named plaintiff and respondent having duly moved this court for an order to amend an order of this court of September 22, 1897, and the judgment entered thereon on September 27, 1897, in the manner specified in the said notice of motion and as herein stated.

And the said application of the plaintiff and respondent having come on duly to be heard before the justices of this court, and after hearing Edwin H. Risley, Esq., of counsel for the plaintiff
641 and respondent in support of the said application and Henry J. Cookinham, Esq., of counsel for the defendant and appellant in opposition thereto,

Now, therefore, on all the papers, pleadings and proceedings herein, and on motion of Risley & Love, attorneys for the plaintiff and respondent, it is hereby

Ordered that the order of this court of September 22, 1897, be amended by striking therefrom the words: "that the judgment so appealed from be and the same is hereby reversed and a new trial ordered with costs to abide the event," and by inserting the words, "that the judgment so appealed from be, and the same hereby is, reversed on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's evidence, and a new trial is ordered with costs to abide the event."

And it is further ordered that the said judgment entered upon said order on September 27, 1897 be amended by striking therefrom the words "that said judgment so entered in the Oneida
642 county clerk's office, as aforesaid, be, and the same is hereby in all things reversed and a new trial ordered with costs to abide the event" and inserting in the place thereof the words "that the judgment so appealed from be, and the same hereby is reversed on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's evidence, and a new trial is ordered with costs to abide the event.

[L. S.] NEWELL C. FULTON, *Clerk.*

Supreme Court, Appellate Division, Fourth Judicial Department, Rochester, N. Y.

I, Newell C. Fulton, clerk of the appellate division of the supreme court, in the fourth judicial department, do hereby certify that the annexed order is a true copy of the original now on file in this office and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the city of Rochester, this 24th day of January, 1898.

[L. S.] NEWELL C. FULTON, *Clerk.*

643 STATE OF NEW YORK, } ss:
Oneida County Clerk's Office, }

I, George D. Frank, clerk of said county, and of the supreme and county courts therein, the same being courts of record, do hereby certify, that I have compared the annexed copy of record and the endorsements thereupon with the original thereof, on file in this office and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts at the city of Utica, this 28 day of Jan'y, 1898.

[L. S.] GEO. D. FRANK, *Clerk.*

[Endorsed:] Court of appeals. The National Harrow Co. app. & pl. *vs.* E. Bement & Sons def't & resp't. Case on appeal. Risley & Love, attorneys for pl. & app. Office and post-office address Herald building, Utica, N. Y.

644 At a special term of the New York supreme court held in the county court-house, Syracuse, N. Y., on June 21, 1900.

Present: Hon. William S. Andrews, justice.

THE NATIONAL HARROW COMPANY, Appellant,
against
E. BEMENT & SONS, Respondent.

The above-named plaintiff having appealed to the court of appeals from the judgment (and order for judgment), of the appellate division of the supreme court in and for the fourth judicial department, entered September 27, 1897, as amended by order of said appellate division January 24, 1898, which said judgment reversed a judgment of the special term of the New York supreme court, entered in the clerk's office of Oneida county, June 11, 1895, upon the report of a referee in favor of this plaintiff and against this defendant, and granted a new trial with costs to abide the event.

And the said appeal having come on regularly to be heard
645 before the said court of appeals, and after argument thereof and due consideration thereupon, the said court of appeals having ordered and adjudged that the judgment of the appellate division of the supreme court so appealed from be reversed and the judgment of the special term be affirmed with costs, as more fully appears by the remittitur of said court of appeals dated June 20, 1900, and filed herein.

Now on filing the said remittitur from said court of appeals, and on motion of Risley & Love attorneys for said plaintiff, it is hereby

Ordered, that the said judgment of the court of appeals be, and the same hereby is made the judgment of this court, and that the said judgment of the said appellate division be reversed and the

said judgment of the said special term be affirmed with costs, and that judgment of this court be entered accordingly.

J. S. C.

Enter.
W. S. A.

[Endorsed:] Granted at the within term and ordered entered in Oneida county. Seth D. Baker, deputy clerk.

646 Supreme Court, Oneida County.

THE NATIONAL HARROW COMPANY
vs.
E. BEMENT & SONS. } Judgment for the Plaintiff.

Whereas, on the 11th day of June, 1895, The National Harrow Company, plaintiff, duly recovered a judgment against E. Bement & Sons, defendant which judgment was duly docketed and entered in the clerk's office of Oneida county on said day in favor of the plaintiff, and against the defendant for the sum of $22,520.23 damages and costs, reference being made to said judgment-roll now on file, for greater certainty of its contents.

And whereas, E. Bement & Sons feeling aggrieved by said judgment did, on the 29th day of July, 1895, appeal from said judgment to the appellate division of the supreme court of the State of New York, in and for the fourth judicial department of said State, and thereafter such other and further proceedings were had in said court that on the 22nd day of September, 1897, the appellate
647 division of the supreme court for the fourth judicial department made an order in said court reversing said judgment and ordering a new trial with costs to abide the event.

That afterwards and on the 24th day of January, 1898, the said order and judgment entered therein was modified; that under the provisions of said orders which were transmitted to the supreme court of the State of New York, in and for Oneida county where the defendant E. Bement & Sons did on the 27th day of September, 1897, enter said order and also enter a judgment on said order, in and by which the first-mentioned judgment was in all thing- reversed and a new trial ordered with costs to abide the event. The judgment-roll was filed and docketed in Oneida county clerk's office on said 27th day of September, 1897, reference being made to the same for greater certainty of its contents.

And whereas, the National Harrow Company, plaintiff in the above-entitled suit, feeling aggrieved by said order and judgment of the appellate division of the supreme court for the fourth judicial department of the State of New York, did on the 27th
648 day of January, 1898, appeal from said judgment and order to the court of appeals for the State of New York, by serving a proper notice of appeal; that afterwards such other and further proceedings were had in the court of appeals of the State of New York, that on June 20, 1900, said court of appeals adjudged and

decreed that the judgment and order of the appellate division of the fourth department be and the same was in all things reversed, with costs, and further ordered and adjudged that the judgment entered in favor of the above-named plaintiff against the above-named defendant on the 11th day of June, 1895, be, and the same was in all things affirmed with costs.

And whereas, by an order of the supreme court the judgment of the court of appeals has been made the judgment of this court, reference being made to the remittitur filed and the order entered thereon for greater certainty of their contents.

Now, therefore, on motion of Risley & Love, attorneys for the above-named plaintiff, it is ordered, adjudged and decreed that the order and judgment of the appellate division of the supreme
649 court for the fourth judicial department of the State of New York, and the judgment entered upon said order on the 27th day of September, 1897, reversing the judgment appealed from and ordering a new trial be and the same are as to each and every part reversed, set aside and held to be as naught.

It is further ordered, adjudged and decreed that the judgment entered in favor of the above-named plaintiff and against the above-named defendant in the clerk's office of Oneida county on the 11th day of June, 1895, for the sum of $22,520.23 be and the same is in all things affirmed with costs.

It is further ordered adjudged and decreed that the plaintiff, The National Harrow Company do now recover of the defendant E. Bement & Sons the sum of $558.90 and costs and disbursements of the said appeals and that the plaintiff The National Harrow Company have execution against the defendant E. Bement & Sons therefor.

Dated Utica, N. Y., June 22, 1900.

Judgment-roll filed, and judgmen*d* signed, entered and docketed this 22 day of June, 1900, at 11.35 a. m.

[Seal Oneida County, New York.]

GEO. D. FRANK, *Clerk.*

650 [Endorsed:] N. Y. supreme court, Oneida county. The National Harrow Company app'l't *vs.* E. Bement & Sons, resp'd't. Order for judgment and judgment. Risley & Love, attorney for app'l't. Office and post-office address, Herald building, Utica, N. Y. Filed June 22, 1900 in Oneida Co. clerk's office 11.35 a. m.

651 To the honorable the Supreme Court of the United States:

Your petitioner, E. Bement & Sons, of Lansing, Michigan, respectfully shows:

I.

That it is a manufacturing corporation, duly organized and existing under the laws of the State of Michigan, having its principal office and place of business at Lansing, in said State; that it is now and has been for ten years and upwards engaged in interstate com-

merce, to wit, the manufacture at Lansing, Michigan, and the sale in each of the States of Michigan, New York, Pennsylvania, Ohio, Indiana, Illinois, Iowa, Wisconsin, Minnesota and others of the States of the United States, of stoves, agricultural implements of various kinds, and among other things of float spring tooth harrows and attachments applicable thereto.

II.

That on or about the 10th day of October, 1894, the National Harrow Company, claiming to be a corporation organized and existing under the laws of the State of New Jersey, began a suit in equity in the supreme court of Oneida county, in the State of New York, against your petitioner, to recover a large sum, to wit, twenty thousand dollars and upwards, as damages for the breach of certain contracts, claimed to have been entered into between the said National Harrow Company and your petitioner, and also praying for an injunction to restrain your petitioner from carrying on its business of selling float spring tooth harrows throughout the United States.

652

III.

Your petitioner answered to said suit and denied that the contracts so sued upon were legal or valid contracts and denying the right of the said National Harrow Company under said contracts to restrain your petitioner from carrying on its business aforesaid, and especially claimed and pleaded that the said contracts, and each of them, were void as in restraint of trade and commerce, within the meaning of the act of Congress approved July 2nd, 1890, being chapter 647 of the first session of the Fifty-first Congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

IV.

Issue being joined in said suit, the same was referred to William A. Matteson, by an order of the said supreme court and such proceedings were afterwards had therein that the same came on to be heard upon pleadings and proofs and was argued by counsel for the respective parties. And thereupon the said referee on, to wit, the 5th day of June, 1895, made and filed his report in the said supreme court, in which he found and determined, notwithstanding the claim of your petitioner that the said contracts were void as in violation of said act of Congress, that said contracts were valid and legal contracts, and that said National Harrow Company, the plaintiff, was entitled to a judgment against your petitioner for alleged breaches of said contracts, for the sum of $20,985.00 damages and $1,535.23 costs of suit, and also that the said National Harrow Company was entitled to an injunction restraining your petitioner from doing any act prohibited by said contracts, to which report of the said

653 referee your petitioner, by its counsel, duly excepted. And thereupon, and notwithstanding said exceptions, a judgment was on the 11th day of June, 1895, duly entered in the said su-

preme court of Oneida county, against your petitioner and in favor of the said National Harrow Company, in accordance with said referee's report.

V.

Your petitioner feeling itself aggrieved by the said judgment, took and perfected an appeal therefrom to the appellate division, fourth department, of the said supreme court of the State of New York, and such proceedings were afterwards had on said appeal that the same came on for hearing before the said appellate division, and the same having been duly considered the said judgment was by the said court reversed, and the said contracts so sued upon held and declared to be void as in restraint of trade and commerce.

The opinion of the said court on said appeal is reported in the 21st Appellate Division Reports, page 290.

VI.

And thereupon the said National Harrow Company, the plaintiff in said suit, took and perfected an appeal from the said judgment to the court of appeals of the said State of New York, and such proceedings were afterwards had that said cause came on to be heard on said appeal before the said court of appeals, and on such appeal your petitioner, by its counsel, expressly claimed the benefit of the said act of Congress, approved July 2, 1890. And due consideration being had on said appeal, it was by the said court of appeals,
654 on the 19th day of June, 1900, adjudged, and determined that the judgment of the appellate division of the supreme court be reversed and the judgment of the supreme court upon the report of the said referee be affirmed. The opinion of the said court of appeals is reported in the 163rd New York, 505.

And afterwards, during the same term of said court, an application for a rehearing was duly made by your petitioner in the said court of appeals, for the reason that the said court had overlooked, among other things, the right which your petitioner claimed under the said act of Congress. And the said application for a rehearing coming on to be heard, was afterwards and on, to wit, the 23rd day of October, 1900, denied.

A certified copy of the record and proceedings in said court of appeals is hereto annexed.

VII.

Your petitioner is advised by counsel, and verily believes, that the effect of the decision of the said court of appeals is in denial of the right, privilege and immunity claimed by your petitioner under the said act of Congress, approved July 2nd, 1890.

That on, to wit, the 20th day of June, 1900, the said record in the court of appeals was remitted to the supreme court of the State of New York in and for Oneida county, and that upon the 21st day of June, 1900, by an order at the special term of said supreme court the judgment of the court of appeals was made the judgment of the said supreme court, and that upon the 22nd day of June, 1900,

the formal judgment in said supreme court, in pursuance of said order, was entered in said Oneida county clerk's office.

Wherefore, your petitioner prays that a writ of error may
655 issue from this honorable court, directed to the said supreme court of the State of New York in and for Oneida county, for the correction of the errors specified in the assignment of errors which is filed herewith, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent by the said supreme court of the State of New York in and for Oneida county, to this honorable court.

E. BEMENT & SONS.

EDWARD CAHILL,
CLARK C. WOOD,
Attorneys for Petitioner, Lansing, Michigan.
HENRY J. COOKINHAM,
Of Counsel, Utica, N. Y.

A writ of error is allowed as herein prayed and the bond fixed for a supersedeas at amount of $35,000, which when filed shall so operate, without prejudice to liability on any existing bond.
November 28th, 1900.

R. W. PECKHAM,
Justice Supreme Court of United States.

655½ [Endorsed:] Copy. In the Supreme Court of the United States. The National Harrow Company plaintiff, *vs.* E. Bement & Sons, defendant. Petition for writ of error. Filed Dec. 11 1900 in Oneida Co. clerk's office. Edward Cahill and Clark C. Wood, Lansing, Michigan, attorneys for defendant. Henry J. Cookinham, Utica, N. Y. of counsel.

656 Know all men by these presents, that we, E. Bement & Sons, a corporation organized and existing under the laws of the State of Mich. of Lansing, Michigan, as principal, and Arthur O. Bement, G. Willis Bement, Cornelius A. Gower, Edwin J. Bement and Henry S. Bartholomew, all of Lansing, Mich., as sureties, are held and firmly bound unto the National Harrow Company of New Jersey, a corporation in the full and just sum of five hundred dollars, to be paid to the said National Harrow Company or to its certain attorney executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of December, in the year of our Lord one thousand nine hundred.

Whereas, lately at a session of the supreme court of the State of New York in and for the county of Oneida in a suit depending in said court, between the said National Harrow Company as plaintiff and the said E. Bement & Sons as defendant a judgment was rendered against the said E. Bement & Sons for the sum of $22,520.23 together with interest thereon from July 11, 1895, and the said E.

Bement & Sons having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said National Harrow Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said E. Bement & Sons shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

657

E. BEMENT & SONS, [SEAL.]
By A. O. BEMENT, *Pres't.* [SEAL.]
A. O. BEMENT. [SEAL.]
G. W. BEMENT. [SEAL.]
C. A. GOWER. [SEAL.]
EDWIN J. BEMENT. [L. S.]
H. S. BARTHOLOMEW. [L. S.]

Sealed and delivered in presence of—

A. E. MERFIELD.
HOWARD BEMENT.

Approved by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

STATE OF MICHIGAN, }
County of Ingham, } *ss:*

Edwin J. Bement and H. S. Bartholomew being duly sworn, each for himself, does depose and say that he is one of the sureties in the foregoing bond and that he is worth the sum of one thousand dollars, after all his debts are paid, in property liable to execution.

Subscribed and sworn to before me this 1st day of December, 1900.

A. E. MIRFIELD, [SEAL.]
Notary Public in and for Ingham County, Michigan.

657½ [Endorsed:] Copy. United States of America. In the Supreme Court. National Harrow Company, appellant, *vs.* E. Bement & Sons, respondent. Bond for costs. Filed Dec. 11 1900 in Oneida Co. clerk's office.

658 The Supreme Court of the United States.

THE NATIONAL HARROW COMPANY, Plaintiff,
vs.
E. BEMENT & SONS, Defendant.

Defendant's Assignments of Error.

I.

The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts Exhibits A and B of the bill of complaint were illegal and void as in restraint of trade, was not an error of law.

I½.

The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts Exhibits A and B attached to the bill of complaint were in conflict with the act of Congress, approved July 2nd, 1890, was not an error of law.

II.

The court erred in affirming the finding of the referee that "the contract entered into June, 1891, including the contracts A and B, between the National Harrow Company of New York and this defendant, were and are good and valid contracts, founded on adequate consideration, and were reasonable in their provisions, contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

659 III.

The court erred in affirming the finding of the referee "that all of the contracts in evidence were and are legal and binding contracts such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints and are not repugnant to any rule of public policy and in restraint of trade, or tending to create a monopoly, trust or any other illegal combination."

IV.

The court erred in affirming the finding of the referee that plaintiff was entitled to judgment against the defendant.

"Second. Decreeing that the contracts, including contracts A and B, are good and valid contracts in law."

V.

The court erred in affirming the judgment rendered on the report of the referee in the supreme court for Oneida county in the said case.

"First. That the plaintiff is a legal and valid corporation, au-

thorized to enforce its rights in courts having jurisdiction; and that all of the contracts in evidence were and are legal, valid and binding contracts, such as may reasonably be made under the circumstances, founded upon an adequate consideration and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade and tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defend-
660 ant and the National Harrow Company of New York, including contracts A and B attached to and made a part of the complaint in this action, are and were intended to be continuing contracts; and that the contracts, including contracts A and B before referred to, are good and valid contracts in law, and that the plaintiff has a good and valid title to said contracts."

VI.

The court erred in holding that the finding of the referee set forth in assignment of error No. 4 did not involve an error of law.

VII.

The court erred in holding that the finding of the referee set forth in assignment of error No. 5 did not involve an error of law.

VIII.

The court erred in holding that the finding of the referee set forth in assignment of error No. 6 did not involve an error of law.

IX.

The court erred in holding that the judgment of the supreme court of Oneida county set forth in assignment of error No. 7 did not involve an error of law.

X.

The court erred in reversing the decision of the appellate division of the supreme court in the said cause that the said contracts were illegal and void as in restraint of trade.

661 XI.

The court erred in overruling the fourth reason assigned in defendant's motion for a rehearing "that the contracts sued upon are upon their face void as against public policy and in restraint of trade."

XII.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves, they are not in violation of the act of Congress known as chapter 647 of the Laws of 1890, and in not holding that the contracts are in violation of said act.

XIII.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves the conceded facts, and facts conclusively proved the contracts are not in violation of the act of Congress known as chapter 647 of the Laws of 1890, and in not holding that the contracts are in violation of said act.

XIV.

The court erred in overruling the nineteenth reason set forth in defendant's motion for a rehearing "that the court overlooked the question that upon the facts found by the referee and on the face of the contracts themselves it was in violation of the act of Congress known as chapter 647 of the Laws of 1890, also section 7, chapter 564 of the Laws of 1890 of the State of New York."

EDWARD CAHILL,
CLARK C. WOOD,
Lansing, Mich.,
Attorneys for Defendant and Appellant.
HENRY J. COOKINHAM,
Utica, N. Y.,
Of Counsel.

661½ [Endorsed:] Copy In the Supreme Court of the United States. The National Harrow Company, plaintiff, *vs.* E. Bement & Sons, defendant. Defendant's assignments of error. Edward Cahill and Clark C. Wood, Lansing, Mich., attorneys for defendant. Henry J. Cookinham, Utica, N. Y., of counsel. Filed Dec. 11 1900 in Oneida Co. clerk's office.

662 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court on a remittitur from the court of appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The National Harrow Company, plaintiff, and E. Bement & Sons, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was
663 drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, priv-

ilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of December, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Writ of error Filed Dec. 11 1900 in Oneida Co. clerk's office.

664 UNITED STATES OF AMERICA, *ss:*

To the National Harrow Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York, wherein E. Bement & Sons is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 5th day of December, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Copy. Due and personal service of a copy of the within citation is hereby admitted this 7th day of December, 1900. Risley & Love, Edwin H. Risley of counsel attorneys for defendant in error. Filed Dec. 11 1900 in Oneida Co. clerk's office.

665 Supreme Court, State of New York.

I, George D. Frank, clerk of the supreme court of the State of New York, in and for the county of Oneida, do hereby certify, that the foregoing printed and typewritten pages numbered from "A" & one to 663 inclusive contain a true copy of the transcript of record and proceedings of said supreme court, in the case of The National Harrow Company *vs.* E. Bement & Sons, as the same appears upon the files and records of said supreme court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said supreme court at the city of Utica, in the county of Oneida, and State of New York, this 11th day of December, A. D. nineteen hundred.

[Seal Oneida County, New York.]

GEO. D. FRANK,
Clerk of the Supreme Court in and for the County of Oneida.

{ Ten-cent United States internal-revenue stamp, canceled Dec. 11, 1900. }

Endorsed on cover: File No. 18,003. New York supreme court. Term No. 215. E. Bement and Sons, plaintiff in error, *vs.* The National Harrow Company. Filed December 19, 1900.

Office Supreme Court
FILED
OCT 12 1901
JAMES H. McKENNEY,
Clerk

No. 215.

Brf. of Cahill & Wood for P. C.

Supreme Court of the United States.

Filed Oct. 12, 1901.

No. 215.—October Term, 1901.

E. Bement & Sons,
Plaintiff in Error,
vs.
The National Harrow Company,
Defendant in Error.

BRIEF OF THE PLAINTIFF IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR, ON THE GROUND THAT NO FEDERAL QUESTION IS INVOLVED.

CAHILL & WOOD,
Solicitors for Plaintiff in Error,
Lansing, Michigan.

FACTS.

At the outset we desire to correct one or two misstatements of fact in the brief of counsel for defendant in error.

1. Reference to the record at the places cited by counsel on page 2 of his brief, namely pages 389 to 392, as also the brief itself on page 3, paragraph 1 quoted from Record page 41, and paragraph 2 quoted from Record page 67, also paragraph 4 on page 4 of brief for counsel for defendant in error, shows conclusively that the excep-

tions which were stipulated out of the case were not all the exceptions which raised questions of law, but the exceptions "to the rulings by the referee in receiving or rejecting evidence." (Record page 390.)

2. In the last paragraph on page 4 of the brief of counsel for defendant in error, and again under III on page 7, it is urged that there are no facts pleaded or found which show that the questions involved in this record related to an article of interstate commerce. This particular allegation will be more fully considered farther on. At present it is sufficient to say that it is directly contradicted by the contracts themselves and by the undisputed testimony in the case. Dale vs. Hyatt, 125 U. S., 46–54, cited by counsel for defendant in error, is not in point for the reason that in that case no question of a conspiracy or combination in restraint of trade was in issue. It was simply a question of contract between two individuals.

3. The Court will decide for itself which of our assignments of error, if any, are applicable to this case.

4. The remaining allegations of fact will be better considered in their appropriate places in the argument.

ARGUMENT.

I.

Was the defendant (plaintiff in error) engaged in interstate commerce?

1. Plaintiff in error (the defendant in the Court below) was a Michigan corporation engaged in the manufacture of harrows in that State.

2. The complaint, by which the suit was commenced, alleges that the Michigan corporation was engaged in the sale of harrows in the State of New York and other States, (Record p. 4, old pp. 4 and 5,) and the whole purpose of the suit brought was to

restrain the Michigan corporation from selling harrows in the State of New York, beyond which any decree obtained could have no force. The defendant, then, was engaged in interstate commerce.

3. That the commerce restrained by these contracts is interstate appears from the contracts themselves.

Complainant's Ex. "A," R. P. 8.
Complainant's Ex. "A," par. first to seventh, R. pp. 8–10.
Complainant's Ex. "A," par. tenth, R. P. 10.
Complainant's Ex. "A," par. fifteenth, R. p. 11.
Complainant's Ex. "B," R. p. 14, paragraph 1.

4. It appears from the undisputed testimony.

R. p. 78, testimony of Emmet Coleman.
R. p. 81, testimony of Hiram Ellis.
R. p. 87, testimony of Willis E. Waite.
R. p. 183.
R. p. 282, sales to George H. Tyler.

The above citations show that plaintiff in error was actively engaged in interstate commerce and that this action was in consequence of and to restrain such commerce.

R. p. 247, old pages 385, 386, shows that plaintiff in error was engaged in interstate commerce with a large part of the United States during the time referred to.

5. That this conspiracy was in restraint of interstate commerce follows directly from the very nature of a patent. A patent covering the right to engage either in state or interstate commerce in the article protected by it, a monopoly of patents or a conspiracy to monopolize them must in the very nature of things, be a monopoly of or a conspiracy to monopolize interstate commerce in that article.

6. No testimony whatever appears in the Record to show either that these contracts were not in restraint of trade or that the commerce restrained was not interstate.

As a matter of fact this monopoly is one of the most vexatious in the country, as will clearly appear by an examination of the Record, and fully merits all that has been said of it by the Court in the cases hereafter cited. At the time this action was commenced it controlled practically the whole of the spring tooth harrow trade of the country. R. p. 125, old pages 195, 196.

7. The original license contract of the National Harrow Company of New York, to which the present company is successor, and which did not materially differ from the contracts in question, except that it extended the restriction for fifty years, was passed upon by the Court in the case of William Strait, et al. vs. The National Harrow Company, in the Supreme Court of Chemung County, and was there held to be in restraint of trade and void. (R. p. 572, Folios 716 and 717.)

On account of this decision complainant abandoned its New York organization and reorganized in New Jersey.

8. Complainant's contract, Exhibit "A," R. p. 9, Defendant's Exhibit 7, R. p. 83. was held void as in restraint of trade by the Appellate Division.

National Harrow Company vs. E. Bement & Sons, 21st App. Div. page 290.

9. Contracts identical with these exhibits, except the names of the parties and the style of harrow licensed, were held void as in restraint of trade in the following cases:

National Harrow Co. vs. Quick, 67 Fed. Rep. 130,

National Harrow Co. vs. Hench, et al. 76 Fed. Rep. 667,

Same case appealed C. C. A. 3rd Circuit, 27 C. C. A. 349, 83 Fed. 36.

National Harrow Co. vs. North-Molitor Mfg. Co., 89 Fed. 1019, 32 C. C. A. 610.

The last above was a memorandum decision dismissing an appeal from the decision of the Circuit Court for the Sixth Circuit and Eastern District of Michigan, dismissing the bill of complaint filed by the National Harrow Company against the North-Molitor Mfg. Co., substantially identical with the bill of complaint filed in this cause. The decision was not reported but was on the ground that the contracts were in restraint of trade.

II.

Was the Federal question raised in the Court below?

1. "Whenever the highest court of a State, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which it by law can exercise appellate authority, the jurisdiction of this Court to review such decisions if it involve a federal question will, upon a proper proceeding, attach."

Williams v. Bruffy, 102 U. S. 248.

"No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the Record that such rights were specially set up or claimed in the State Court in such manner as to bring it to the attention of the Court."

Green Bay & M. Canal Co. vs. Patten Paper Co. 172 U. S. 58.
Dewey vs. City of Des Moines, 173 U. S. 193.
Roby vs. Colehour, 146 U. S. 153.
C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226.

Such an adverse decision may be made merely by denying the right to an appeal.

Gregory vs. McVeagh, 23 Wall. U. S. 294.

"When from the pleadings and record it is apparent that a State Supreme Court could not have reached the decision announced except by disposing of a federal question, the Supreme Court of the United States will review such question, although it was not put in issue by the pleadings nor directly passed upon in the opinion."

Kaukauna Water Power Co. vs. Green Bay & Canal Co., 142 U. S. 254.
Davis vs. Packard, 6 Pet. U. S. 41.

2. The federal question was raised before the referee by defendant's amended answer. R. p. 40, old page 64.

It will be noted that Exhibit 7 of defendant's amended answer, above referred to, is a duplicate of Exhibit A, attached to the bill of complaint.

3. The decision of the referee was in denial of the right.

Findings of Referee and 1st and 2nd Findings of Law, R. p. 67, old page 107.

4. The judgment of the Supreme Court was in denial of the right. R. p. 69, old page 109, 1st.

5. It was raised before the Appellate Division by the exceptions and appeal. R. p. 368, old page 575.

No complaint was ever made of the sufficiency of these exceptions.

6. The Appellate Division reversed the decision of the referee and determined in favor of the right that the contracts were void as in restraint of trade.

National Harrow Co. vs. E. Bement & Sons, 21 App. Div. N. Y. 290, R. p. 396 to 401, old pages 623 to 633.

7. It was stipulated that the federal question should be determined by the Court of Appeals.

R. p. 390, old page 612 first and second.

8. The decision of the Court of Appeals was in denial of the right for it affirmed the decision of the referee, thus sustaining the validity of the contracts and denying their violation of the Act of Congress in question.

National Harrow Co. vs. E. Bement & Sons,
R. p. 405, old page 645.

9. The federal question was again raised before the Court of Appeals by the motion for a re-hearing and was again denied. R. p. 409, old page 654.

In the face of the above we fail to see how the declaration on page 8 of the brief for defendant in error that "There is not one word in the Record which shows, or tends to show, that a federal question was decided either in the trial court or in the appellate division, or in the Court of Appeals," can be sustained.

10. We take no issue with the cases cited under paragraph IV, page 7 of the brief for defendant in error. They simply enunciate the well settled doctrine that if the record does not raise a federal question jurisdiction will not be retained and are therefore not in point upon the case at bar.

III.

Considering the brief for defendant in error as a whole, it seems to rest for its entire force upon the assumption that the question as to whether these contracts were or were not void as being in restraint of trade was a question of fact and not of law, and that for that reason the Court of Appeals refused to consider it. This assumption seems to us to be unsupported by the record for the following reasons.

1. As we have tried to show above, the referee found, as a matter of law, that the contracts were good and valid at law, and not in restraint of trade. The

Supreme Court rendered judgment to the same effect and therefore in direct denial of the right claimed by plaintiff in error. The Appellate Division held, as a matter of law, that the contracts were on their face void as being in restraint of trade. The Court of Appeals reversed this decision and affirmed the decision of the referee, and there is not a word in the opinion of the Court to indicate that it did not fully consider the question as to whether these contracts were in violation of the anti-trust law and decide as a matter of law that they were not. It is true that the main part of the opinion was given to the discussion of whether they would take up certain questions of fact, but it is also true that there is not a word in the opinion to indicate that one of the matters excluded in this way was the validity of these contracts under the anti-trust law. On the other hand, we believe a fair reading of the opinion will show that they did consider this question as a matter of law and decided against the right.

2. But, be that as it may, the invalidity of these contracts appears upon their face and by the undisputed testimony and the question is therefore purely one of law and not of fact and the Court of Appeals cannot, by merely saying that a question of law is one of fact, deprive this Court of jurisdiction.

Alexander vs. Machan, 147 U. S. 72.

IV.

The Court will not upon this motion go into the merits of the case any further than is necessary to determine the question of jurisdiction, and it will determine that upon the face of the pleadings and decrees.

The questions on this motion are:

1. Was the right to the protection of the Federal statute claimed? 2. Was the effect of the decision of the State Court in denial of that right?

As to whether such right was properly denied is a

question that goes to the merits of the case, and will be decided only after full hearing.

V.

The petition for the writ of error in this case averred all the facts neccessary to give this court jurisdiction. The writ was allowed by Mr. Justice Peckham after a full hearing from both sides. Neither at such hearing nor since has any fact contained in the petition been questioned.

EDWARD CAHILL and CLARK C. WOOD,
Solicitors for Plaintiff in Error.

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No. 215.

Office Supreme Court U.S.
FILED
OCT 14 1901
JAMES H. MCKENNEY,
Clerk

Brief of Cookinham for P. E.

Supreme Court of the United States.

No. 215.—October Term, 1901.

Filed Oct. 14, 1901.

E. Bement & Sons,
Plaintiff in Error,
vs.
The National Harrow Company,
Defendant in Action.

This is a motion to dismiss the writ of error on the ground that no federal question is involved.

The subject of litigation is Spring Tooth Harrows.

The suit is one in equity to enforce two alleged contracts set out in full in the complaint. The two contracts are the same in form but refer to a different style of harrow.

Record P. 3 to 21.

The defense is that the contracts are void as against public policy and in restraint of trade, and, also, that they are in violation of the Act of Congress known as "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," passed July 2d, 1890.

Record P. 23 to 58.

To show that the alleged contracts sued upon are void, defendant pleaded that, at the time of making the alleged contracts and as a part of the same transaction, other written contracts were made between the

parties to this litigation, and also with eighteen others. These several contracts are set out in full in the amended answer and are known as Exhibits 1, 2, 3, 4, 4½, 5, 6 and 7. Exhibit 7, attached to the answer being the same as the contract set out in the complaint. Some of these parties are corporations organized under the laws of the State of New York and others are corporations organized under the laws of other states. These parties carried on their manufacturing business at different points in the United States and marketed their products generally throughout the Union. The issues in the case were referred, and the case was tried before a referee who rendered his decision in favor of the plaintiff and against the defendant.

Record P. 59, also Record P. 62.

The referee found facts as follows: "I decide that the contract entered into in June, 1891, including the contracts 'A. and B.' between the National Harrow Company of New York and this defendant, were, and are, good and valid contracts, founded upon adequate considerations and were reasonable in their provisions: contracts 'A. and B.' imposed no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction to impose and accept."

Record P. 65.

He also found "That all of the contracts in evidence were, and are, valid and binding contracts such as might reasonably be made under the circumstances, founded upon an adequate consideration and that they embodied no illegal restraints and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or other illegal combination, and that the contracts entered into be-

tween the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts and should be enforced according to their true intent and meaning as hereby interpreted."

He then further found as conclusions of law that the plaintiff was entitled to judgment against the defendant.

2d. Decreeing that the contracts including contracts A and B are good and valid contracts in law.

3d. Decreeing specific performance, etc.

Record P. 67.

Judgement was entered upon this report and the defendant appealed to the Appellate Division of the Supreme Court, where the judgment was reversed and a new trial ordered.

Record P. 393.

From that judgment the plaintiff appealed to the court of appeals where the judgment of the Appellate Division was reversed and the judgment entered upon the report of the referee affirmed.

Record P. 406.

From this judgment a writ of error is taken to this court.

POINTS.

I.

It is most extraordinary that the counsel for the defendant in error can make the statement which he makes on page 2 of his motion papers "that the exceptions which raised questions of law in the case were by the act of the parties stipulated out of the case after the judgment had been entered upon the decision of the referee."

No stipulation affecting the rights of the parties in that regard has ever been made except one, which is found on page 389–390 of the Record, and I call attention to the stipulation for the purpose of showing the extraordinary character of the statement of counsel. It will be noted that the stipulation eliminates no law question from the case except that which relates to exceptions to the ruling of the referee upon the reception and rejection of evidence.

The argument of the learned counsel for the defendant in error is an attempt to show that there is no federal question before this court by reason of the peculiar provisions of the New York Statute, and the holding of the court of appeals of that state in this case.

My object in furnishing this brief in addition to the able argument of my associates is to show just what the situation of the case is with regard to the holding of the Court of Appeals. I am fully aware what the law is with reference to the decisions of the courts of the respective states, construing their own statutes, and I do not cross swords with counsel for the defendant upon that point. In this case, however, the

question is not the construction of the New York State Statutes, it is whether or not the court of appeals of the State of New York, has correctly construed the report of the referee and whether or not the facts found by the referee in connection with the contracts before the court are sufficient to raise a federal question.

The court of appeals misconstrued the report of the referee, in that it held that the referee had only decided that the contracts "A" and "B" attached to the complaint were valid contracts, utterly ignoring the fact that the referee had also decided that all the contracts in evidence were valid contracts. This is made apparent by reading the dissenting opinion of Judge Cullen where he states, in substance, that only the contracts "A" and "B" attached to the complaint were considered by the court. By referring to the portion of the referee's report above quoted it will be seen that the referee found that all of the contracts attached to the amended answer were valid contracts as all of these papers were in evidence before him.

I desire to call attention here to the fact that most of these contracts and all of the important ones were put in evidence by plaintiff.

Record P. 72.

All these important agreements are dated April 1st, 1891, but as a matter of fact were never executed until the 16th or 17th day of June, 1891. This is the explanation of the referee's reference to the papers as having been executed in June, 1891.

It is apparent again that the court of appeals misconstrued the portion of his report above quoted "that the contract entered into in June, 1891, including the

contracts "A" and "B," were valid contracts." It is certain then that there was before the court of appeals and there is before this court all the material contracts set out in the amended answer.

Let us see now just what the substance of these contracts is, calling attention particularly to Exhibits 5, 6 and 7. It is apparent that nineteen different manufacturers of spring tooth harrows had entered into an agreement to form a combination for the purpose of controlling the harrow trade; that they had agreed upon prices, and the contract provided that the combination should be effective when all the parties had signed the papers, or in case any of them did not sign on or before June 1st, then the papers were to become effective, provided the board of trustees of the company should resolve that the papers should be delivered.

Record P. 50, Fol. 80.

The contract, known as Exhibit 5 and called the Escrow Agreement, is one of the separate papers executed at the same time that the contracts A and B were executed and as a part of the same transaction, and the fulfilling of the conditions of this Escrow agreement were necessary in order to make the contracts A and B effective, for this contract provided as follows:

"But in case any of the above named persons, firms and corporations so neglect or refuse to sign, execute and deliver said respective contracts and licenses on or before the 1st day of June next, then, and in such case said E. Norris shall, provided he shall be so directed by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed

and executed, as above provided, at which time said *contracts and licenses shall become operative* and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then, and in such case, the said Norris shall cancel each of said contracts and licenses and they shall be null and void."

In order to establish that the contracts ever became "operative" it was necessary for plaintiff to show that one of the two conditions of the Escrow agreement was fulfilled.

1st. That all the parties named in the Escrow agreement executed all the papers. Or

2nd. That the National Harrow Company, by resolution of the trustees decided to have the papers delivered, although all the parties named in the Escrow agreement had not executed them.

It was also necessary for the referee to find that one or the other of these facts existed in order to decide in favor of the plaintiff.

This the referee did, and in so doing it was necessary for him to find the making of the combination agreements between these ninteen parties to monopolize this branch of commerce and that commerce was necessarily interstate because it had reference to an article sold by these manufactures and each of them in many different states.

By the contracts "A" and "B" the price of harrows was arbitrarily fixed. These contracts provide that the price shall be different in different states. For instance, there shall be a maximum discount of 42 per

cent in New England States, the States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and West Virginia, and a maximum discount of 45 per cent in all the other states. An illustration will show that the price is arbitrary. For instance, Springfield is in the State of Pennsylvania very near the Ohio line. Canneaut is in Ohio immediately opposite, there being simply an imaginary line between these two towns, yet the price of harrows in Pennsylvania is fixed at 42 per cent discount whereas in Ohio it is fixed at 45 per cent discount.

Every manufacturer produced a different style of harrow and the license contract itself provides that no one of the parties shall be permitted to make the style of harrow manufactured by any other. No two of these harrows could be produced at precisely the same expense, yet the selling price fixed was the same.

By a second illustration it is made clear that the contracts are in violation of the act of congress as being in restraint of interstate commerce.

The Eureka Mower Company, one of the contracting parties, was located at Utica, New York. Under the contracts it could sell harrows in Denver or California for less money than it could sell them in the city of Utica, where they were manufactured. And this solely because of the contract which had restrained them from selling their harrows in New York at a less sum where no freight was to be added, than at a point across the continent where the expense of transporting them would have to be added to the cost of the harrow in order to establish a fair selling price.

It would seem that there is no such thing as a contract in restraint of interstate commerce unless this

"contract," referring to all of the agreements in the case, which the referee found to be the "*contract*" is not one of that character.

The case of the United States against Addyston, Pike & Steel Co, 85, Federal Reporter 271, would seem to be an authority sustaining our position here.

II.

I do not wish to add anything to what is said by my associates upon the point that the contracts are void under the act of congress, except to call attention to the fact that the cases cited by my associates under their first point, were those brought by the defendant in error here upon these contracts, that is, upon the precise papers which are before the court in this case and that every time a federal court has passed upon them it has held that they were void. It would seem that the Court of Appeals has inadvertently misconstrued the report of the referee and has therefore arrived at an erroneous conclusion. That, in so doing, it necessarily held that the contracts were not in restraint of trade nor inimical to the act of Congress against trusts and monopolies.

III.

The motion should be denied and the plaintiff in error should be allowed to argue the case on its merits.

HENRY J. COOKINHAM,
Counsel for Plaintiff in Error,
Utica, N. Y.

No. 215.

By Cahill, Wood & Cookinham for P. C.

Supreme Court of the United States.

No. 215.—October Term, 1901.

Filed Mar 7, 1902.

E. Bement & Sons,
Plaintiff in Error,

vs.

The National Harrow Company,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD CAHILL & CLARK C. WOOD,
Solicitors for Plaintiff in Error.

H. J. COOKINHAM,
Of Counsel.

LANSING
H. H. STALKER & COMPANY
1902

Supreme Court of the United States.

No. 215.—OCTOBER TERM, 1901.

E. Bement & Sons,
Plaintiff in Error,

vs.

The National Harrow Company,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD CAHILL & CLARK C. WOOD,
Solicitors for Plaintiff in Error.

H. J. COOKINHAM,
Of Counsel.

STATEMENT OF THE CASE.

The facts in this case, so far as the federal question is concerned, are undisputed and are as follows:

In the year 1890 the interstate Spring Tooth Harrow business of the country was almost entirely conducted by about twenty companies.

Findings of Referee, R. p. 62;

Testimony of A. O. Bement, R. p. 183, old p. 288;

Testimony of Brinkerhoff, R. p. 114.

There had been some litigation over patents between these parties, and in September, 1890, a proposition was made to organize a combination of manufacturers nominally "for the mutual advantage of all engaged in the Float Spring Tooth Harrow business," but really to monopolize the trade in spring tooth harrows in the United States.

Testimony of A. O. Bement, R. p. 183;
Findings of Referee, R. p. 63.

The first step in carrying out this scheme was the contract, Defendant's Ex. 100, (R. p. 292, et seq.). This contract provided for the formation of a corporation to be known as the National Harrow Company To this corporation all those that entered it were to assign their patents and good will; "upon uniform terms and uniform conditions;" to receive the appointment of agents and licensees of the corporation; to agree to make no Float Spring Tooth Harrows except as such agents or licensees and to receive in compensation for their patents and good will, the value thereof "as agreed upon or fixed by arbitration in paid-up stock of the corporation."

Defendant's Ex. 100, R. p. 292, et seq.;
Testimony of C. H. Childs, R. pp. 128, 129.
Testimony of E. H. Risley, R. p. 154, o. p. 241.

In pursuance of this agreement, the National Harrow Company was organized in September, 1890, under the laws of the State of New York.

Findings of Referee, R. p. 63.

Within a short time thereafter, the National Harrow Company made, with the different firms and corporations composing it, a series of contracts and

agreements similar to those printed in the Record as Ex's. 1, 2, 3, 4 and 4½.

R. pp. 41-49;

Testimony of Leroy W. Stevens, R. p. 114.

Exhibit 1, provided that the parties to it should assign their entire float spring tooth harrow business, including patents and good will, to the National Harrow Company, and to receive in exchange for it paid-up stock of the corporation for the value of the stock of the business so transferred "to be agreed upon or settled by arbitration." They were also to receive a license authorizing

"The same firm and the same corporation to build and market the same style and construction of float spring tooth harrows which the person, firm or corporation was engaged in building and marketing just prior to the sale by him, them or it to the National Harrow Company and upon condition that such person, firm or corporation shall pay at uniform times, with all other agents, to the National Harrow Company one dollar on account of each and every float spring tooth harrow sold and delivered after September 1, 1890."

It was also agreed that in case the corporation should thereafter be dissolved, all the interests so assigned were to be re-transferred to the parties originally assigning them to the corporation. Each stockholder was to surrender his stock and any money remaining on hand was to be ratably divided between stockholders.

"The intent being that each interest shall stand after dissolution upon the same ground with reference to their respective interests as they did prior to the execution of this contract so far as the same can be carried out."

Ex. 1, R. pp. 42, 43, Par's 2 and 3.

Exhibit 3 (R. p. 47) provided for the arbitration referred to in Exhibit 1 and appointed the arbitrators.

Exhibit 2 (R. p. 45) was an assignment made as provided in Exhibits 1 and 3, by which the various firms and corporations conveyed to the National Harrow Company all their patents, good will and all their interests in the manufacture of spring tooth harrows and agreed not to engage in the spring tooth harrow business, directly or indirectly, except as a licensee of the National Harrow Company for a period of fifty years. In consideration of this assignment they were to receive as provided in Exhibit 1, paid-up stock of the National Harrow Company to the amount agreed upon by arbitration, under Exhibit 3 and a license to sell as agent of the National Harrow Company the same style of harrow they had been previously manufacturing.

Exhibit 4½ (R. p. 49 is the schedule of prices made necessary by the other exhibits referred to in order to make each licensee "subject to the same terms and conditions as every other agent and licensee." This contract not only provided the price at which the goods should be sold but also the discounts that might be allowed for sales in other states outside of those in which the manufacture was carried on, in other words, transactions of interstate commerce.

All of these exhibits, viz.: 1, 2, 3, and 4½ were signed by practically all the spring tooth harrow manufacturers in the country.

Testimony of A. O. Bement, R. pp. 183 and 184.
Findings of Referee, R. pp. 62 and 63.

Exhibit 4 (R. p. 48)is an escrow agreement by which the Clipper Chilled Plow Company placed its

agreements, Exhibits 1, 2 and 3 in the hands of Mr. Risley to be delivered under certain conditions, in the meantime agreeing to be bound by the schedule, Exhibit 4½. It does not clearly appear from the record whether a similar escrow to this was signed by all the other parties concerned, but it is immaterial since all the others actually became stockholders in the corporation and executed and delivered the assignments.

The Clipper Chilled Plow Company becoming dissatisfied brought suit against the National Harrow Company for the cancellation of the contracts. The court held that the contracts 1, 2 and 3 were in restraint of trade and decreed that they should be delivered up for cancellation.

Defendant's Ex. 134, R. pp. 362-367.
Strait v. Nat'l Harrow Co., 18 N. Y. Sup. 224.

These papers, except the assignments of patents, were subsequently destroyed and the contracts made with the different firms and corporations were canceled.

Testimony of A. O. Bement, R. pp. 226, 227;
Testimony of E. H. Risley, R. pp. 154, 155, 159;
Testimony of Leroy W. Stevens, R. p. 114.

Up to this time, although the National Harrow Company had been in existence from September, 1890, no stock had ever been issued and nothing had ever been paid upon it, there were in fact no stockholders or subscriptions for stock.

After, or at the time of, the cncellation of these contracts a new set of papers, substantially the same in their effect, except that they were made binding for the life of the patents instead of for fifty years, and did not include an assignment of the good will,

was made to take their place. These agreements are printed in the record as Ex's 1, 2, 3, 4 and 5; Ex. 1 being the same as Ex. A attached to the bill of complaint and printed in the Record, pp. 7-13; Ex. 2 being Ex. B attached to the bill of complaint and printed in the record, pp. 13-19; Ex. 3 is the same as Ex. 6 attached to the amended answer and is printed in the record on pp. 51, 52; Ex. 4 is the same as Ex. 5 of the amended answer and is printed in the record on p. 50. These contracts and agreements all bear date April 1, 1891, and when executed were to take effect as of that date, and really constitute one contract, but as a matter of fact were not all executed and delivered until about June 16 or 17, 1891.

Findings of Referee, R. pp. 63 and 65;
Testimony of Edwin H. Risley, R. p. 156;
Testimony of A. O. Bement, R. p. 227;
Testimony of Brinkerhoff, R. p. 327;
Testimony of Leroy W. Stevens, R. p. 114;
Defendant's Exs. 113, 114, 116, R. pp. 302-303.

The assignment, plaintiff's Exhibit 3, defendant's Exhibit 6 (R. p. 51 made at this time does not purport to be a new conveyance but

"Ratifies and confirms the assignment, sale and transfer of each and every patent and pending applications for patents heretofore made and executed by said second party to said first party."

Thus clearly referring back to, and linking the whole transaction with Exhibits 1, 2, 3 and 4½.

The delay in the delivery of the agreements was in consequence of the escrow agreement (Ex. 5, R. p. 50) by the conditions of which the contracts were not to be delivered or take effect until they had been signed by nineteen different persons, firms and corporations constituting substantially all the spring tooth harrow

manufacturers in the United States, except that it was also provided in the escrow agreement that if all the said parties should not sign before June 1, 1891, the National Harrow Company might, by a resolution of its board of directors, order its agreements, licenses, etc., to be delivered and they should then go into effect, or if the company should decide not to accept less than the whole number they should be canceled. This clearly indicates the purpose of the whole transaction.

"When Exs. 1, 2, 3, 4 and 5 had been signed by all those that did sign them, it constituted the manufacturers of all the spring tooth harrows in the United States at that time, except the Chilled Plow Company of Elmira and Blaker."

Testimony of Leroy W. Stevens, R. p. 115;
Testimony of Warren M. Brinkerhoff, R. p. 145;
Award of Arbitration, R. pp. 313-316.

In July, 1891, a new corporation was organized under the laws of New Jersey, by the same name as the old company and for substantially the same purpose. It will be noticed by reference to the articles of this new company that the capital stock was $500,000 divided into five thousand shares of $100 each. Fifty-three of the five thousand shares were subscribed, all of the subscribers being residents of New York instead of New Jersey.

Findings of Referee, R. p. 65;
Articles of Incorporation, R. pp. 156, 158.

To this company the National Harrow Company of New York by a written agreement made September 9, 1891, assigned all its rights and interests, except

$1,000 in cash, for a consideration of $455,000 of paid-up stock of defendant in error.

Plaintiff's Ex. 6, R. p. 73.

This stock was afterwards divided among the different parties forming the National Harrow Company of New York, and the said company then went out of business.

Concessions, R. p. 320, o. p. 501;

No consideration passed from the National Harrow Company to the plaintiff in error for any of these transfers except the stock already referred to being the consideration set forth in the agreements, the same that was given to all the persons, firms and corporations forming the National Harrow Company except as to the amount of stock given.

Testimony of A. O. Bement, R. pp. 227, 228.

Plaintiff in error lived up to the terms of the license contracts and paid royalty until August 1, 1893, since which time it has repudiated the contracts as being void and has refused to make reports or pay royalties thereunder.

R. pp. 76, 77.

It was admitted on the trial that there was not a spring tooth harrow manufacturer in the United States except the licensees of the National Harrow Company that had not been sued by it for infringement of patents.

Testimony of Warren M. Brinkerhoff, R. p. 147.

Neither the defendant in error not its predecessor, the National Harrow Company of New York, ever owned any manufactory or conducted a manufactur-

ing business, and with the exception of perhaps two hundred harrows which were manufactured for defendant in error in Kalamazoo, neither it nor its predecessor has ever engaged in the manufacturing business at all.

Testimony of Edwin H. Risley, R. p. 159.

And none of the parties organizing defendant in error were in the spring tooth harrow business.

Report of Referee, R. p. 65.

The methods employed by the company in the transaction of its business are clearly shown by Exhibits 102-112 (R. pp. 296-302), and will be more fully referred to hereafter.

The parties engaged in this conspiracy were engaged in interstate commerce. This clearly appears,

(a) From the contracts themselves.

Complainant's Ex. "A", R. p. 8;
Complainant's Ex. "A", Pars. 1 to 7, R. pp. 8-10;
Complainant's Ex. "A", Par. 10, R. p. 10;
Complainant's Ex. "A", 15th, R. p. 11.
Complainant's Ex. "B", R. p. 14, Par. 1.

(b) It also appears from the undisputed testimony.

R. p. 78, testimony of Emmet Coleman;
R. p. 81, testimony of Hiram Ellis;
R. p. 87, testimony of Willis E. Waite.
R. p. 183.
R. p. 282, sales to George H. Tyler.

The bill of complaint itself shows that it was filed for the express purpose of restraining plaintiff in error from engaging in interstate commerce in the

state of New York and for recovering damages for previous acts of interstate commerce

Complaint, R. p. 4, Pars. 8, (a), (c), (e) and (f).

October 10, 1894, the National Harrow Company, defendant in error, filed a complaint in the Supreme Court of Oneida county, New York, against the plaintiff in error praying for specific performance of contracts A. and B, plaintiff's Exhibits 1 and 2, and for damages for violations of said contracts by plaintiff in error.

Plaintiff in error appeared and answered and the action was referred to William A. Matteson of Utica, New York.

R. p. 2, o. p. 1.

Plaintiff in its amended answer to the complaint of defendant in error averred among other things "that said Exs. 1, 2, 3 and 4½ and also Exs. 5, 6 and 7 are in violation of and to that end defendant expressly pleads the act of Congress of the United States approved July 2, 1890, being chapter 647 of the first session of the fifty-first Congress entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.'"

R. p. 41, o. p. 64;

Amended form of answer, R. p. 382, o. p. 599.

It also averred "that the real object of said corporation was to form a trust and combination for the sole purpose of monopolizing the manufacture and trade in spring tooth harrows in the United States and that the said Exhibits 1, 2, 3, 4½, 5, 6 and 7 in effect did form a trust and combination and that the said National Harrow Company, plaintiff herein, is the result thereof and that it was in reality formed for

the sole purpose of effecting the absolute control of the manufacture and sale of spring tooth harrows in the United States and that said company has in fact substantially accomplished its object, which it alleges upon information and belief is unlawful on the ground that it is against public policy and in restraint of trade."

Amended answer, R. p. 382, o. p. 599;
Amended answer, R. p. 41, o. p. 65.

Exhibit 7 above referred to is substantially identical with Ex. A attached to the bill of complaint, plaintiff's Ex. 1, at page 7 of the record. Ex. 6 is plaintiff's Ex. 3 and Ex. 5 is plaintiff's Ex. 4. Plaintiff's Ex. 2 is substantially identical with plaintiff's Ex. 1 and Ex. 7 attached to the bill of complaint except in the territory to which it applies.

Testimony was taken and the case came on to be heard before the referee upon pleadings and proofs, and on June 5, 1895, the referee found among other things that all the contracts in evidence "were and are legal, valid and binding contracts such as might reasonably be made under the circumstances founded upon an adequate consideration and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade or tending to create a monopoly, trust or any other illegal combination."

Findings of Referee, R. p. 67, o. p. 107.

We desire at this point to call the court's attention to the fact that this finding covered "all of the contracts in evidence," thus including all of those offered by plaintiff in error as well as those offered by the National Harrow Company and conceding that all the

contracts stood on the same basis. The referee also found that all the contracts referred to were dated April 1, 1891, but were not to take effect until June, 1891, and combines them together as "the *contract* entered into in June, 1891, including the contracts "A" and "B".

Findings of Referee, R. p. 64, o. p. 102;
Findings of Referee, R. p. 65, o. p. 102.

The referee also found as a conclusion of law, "2nd. That the *contracts including contracts A and B* are good and valid contracts in law" (R. p. 67, o. p. 107), thus again including all the contracts under one classification.

June 11, 1895, a decree was entered in the Supreme Court of Oneida county in accordance with the findings above referred to, to the effect "that *all of the contracts in evidence* were and are legal, valid and binding contracts * * * * and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade and tending to create a monopoly, trust or any other illegal combination.

The case was appealed to the appellate division of the Supreme Court and it was stipulated that among the questions to be determined on the appeal was "*whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890*, chapter 647 of the first session of the fifty-first Congress."

Stipulation, R. p. 390, o. p. 612.

The decision of the referee was reversed for errors of law (R. p. 392, o. p. 616), the court holding that the contracts were in law "*void as against public policy;*" that the provisions of the contracts "*not only*

stifle competition between the plaintiff's licensees but effectually prevent them from attempting to make any improvements in harrows" and that the contracts were void "as against public policy because by them it is sought to control for a long period of years, during the life of the patents, the prices of float spring tooth harrows."

Opinion of Appellate Division, R. pp. 396-401.

The order of reversal was afterwards amended to show that the judgment was "reversed on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's evidence."

R. p. 404, o. p. 642.

Defendant in error appealed from the decision of the appellate division of the Supreme Court and June 19, 1900, the Court of Appeals handed down an opinion in the case in which it held that "we are unable to find in this record any errors of law upon which the appellate division could reverse the judgment." Accordingly the Court of Appeals reversed the judgment of the appellate division and affirmed that of the Supreme Court. The opinion of the Court of Appeals and the dissenting opinions of J. J. Cullen and Bartlett are printed in the supplement to this brief on pages 14 to 22 inclusive.

From this decision plaintiff in error appeals to this court and as the record had already been remitted to the Supreme Court a writ of error was issued from this court to the Supreme Court of Oneida county, that being the court in which the record was at the time the writ of error was issued.

The writ of error was allowed by Mr. Justice Peck-

ham after a hearing of counsel for both parties on the question of the jurisdiction of this court.

October 14, 1901, defendant in error moved to dismiss the writ of error on the ground that "the record in this case fails to disclose that any question was raised or decided in the Court of Appeals in the state of New York in whch any treaty of the United States or any laws of the United States or any constitutional provisions of the United States or any right granted or prohibited by any treaty of the United States or any law of the United States or any constitutional provision of the United States was involved." This motion is still pending.

PLAINTIFF IN ERROR'S ASSIGNMENTS OF ERROR.

The plaintiff in error in this case claims and intends to urge the following errors:

I.

The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts, Exhibits A and B of the bill of complaint, were illegal and void as in restraint of trade, was not an error of law.

I½.

The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts, Exhibits A and B, attached to the bill of complaint were in conflict with the act of congress, approved July 2, 1890, was not an error of law.

II.

The court erred in affirming the finding of the referee that "the contract entered into June, 1891, including the contracts A and B, between the National Harrow Company of New York and this defendant, were and are good and valid contracts founded on adequate consideration, and were reasonable in their provisions, contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

III.

The court erred in affirming the finding of the referee "that all of the contracts in evidence were and are legal and binding contracts such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints and are not repugnant to any rule of public policy and in restraint of trade, or tending to create a monopoly, trust or any other illegal combination."

IV.

The court erred in affirming the finding of the referee that plaintiff was entitled to judgment against the defendant,

* * * * * *

"Second. Decreeing that the contracts, including contracts A and B are good and valid contracts in law."

V.

The court erred in affirming the judgment rendered on the report of the referee in the Supreme Court for Oneida county in the said case.

"First. That the plaintiff is a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction; and that all of the contracts in evidence were and are legal, valid and binding contracts, such as may reasonably be made under the circumstances, founded upon an adequate consideration and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade and tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B attached to and made a part of the complaint in this action, are and were intended to be continuing contracts; and that the contracts, including contracts A and B before referred to, are good and valid contracts in law, and that the plaintiff has a good and valid title to said contracts."

VI.

The court erred in holding that the finding of the referee set forth in assignment of error No. 4 did not involve an error of law.

VII.

The court erred in holding that the finding of the referee set forth in assignment of error No. 5 did not involve an error of law.

VIII.

The court erer in holding that the finding of the

referee set forth in assignment of error No. 6 did not involve an error of law.

IX.

The court erred in holding that the judgment of the Supreme Court of Oneida county set forth in assignment of error No. 7 did not involve an error of law.

X.

The court erred in reversing the decision of the appellate division of the Supreme Court in the said cause that the said contracts were illegal and void as in restraint of trade.

XII.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves, they are not in violation of the act of Congress known as chapter 647 of the laws of 1890, and in not holding that the contracts are in violation of said act.

XIII.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves the conceded facts, and facts conclusively proved, the contracts are not in violation of the act of Congress known as chapter 647 of the laws of 1890, and in not holding that the contracts are in violation of said act.

Summing up these assignments of error, it is claimed on the part of plaintiff in error that the contracts in question in this action, to wit, plaintiff's

Exhibits 1, 2, 3, 4 and 5 must be construed together, and when so construed, constituted a contract or conspiracy in restraint of interstate commerce within the meaning of the act of Congress known as chapter 647 of the laws of 1890, and that the right so claimed under the federal statute was urged at the proper time and in the proper manner in each and all of the courts of the state of New York that had jurisdiction of the question, and that the highest court of the state of New York having jurisdiction of the question decided adversely to the right so claimed.

There is a clerical error in assignments of error Nos. VI, VII, VIII and IX, the Arabic numerals 4, 5, 6 and 7 in those assignments of error should read respectively, II, III, IV and V.

ARGUMENT.

The case presents two main questions for the consideration of the court.

1st. Is a federal question involved in this case of which this court can take jurisdiction?

2d. Are the contracts and agreements referred to void under the act of Congress in question?

IS A FEDERAL QUESTION INVOLVED IN THIS CASE OF WHICH THIS COURT CAN TAKE JURISDICTION ?

I.

A federal question was properly raised before the Supreme Court of Oneida county and its decision was in denial of a right claimed by plaintiff in error under a federal statute.

1. The federal question was raised before the referee by defendant's amended answer.

R. p. 40, o. p. 64.

It will be noted that Exhibit 7 of defendant's amended answer is a substantial duplicate of Exhibit A attached to the bill of complaint, and that Exhibits 5 and 6 attached to defendant's amended answer are the same as complainant's Exhibits 4 and 3 respectively, offered in evidence.

R. p. 381, o. p. 596.

R. p. 72, o. p. 114-115.

2. The referee found among other facts:

(a) That the entire spring tooth harrow business of the country was, prior to September, 1890, conducted by six firms and corporations. (R. p. 62).

(b) That these firms and corporations agreed to organize a corporation under the laws of New York to be known as the National Harrow Company. (R. p. 63).

(c) That the corporation was formed and that these six firms, with others including plaintiff in error, assigned to it their patents, license contracts and privileges under patents. (R. p. 63).

(d) That the licenses issued by this company to its licensees were declared illegal as in restraint of trade and were canceled by the parties thereto. (R. p. 63).

(e) That plaintiff in error in the fall of 1890 entered into the contract (defendant's Exhibits 1, 2, 3 and 4½, R. pp. 41-49), with the National Harrow Company of New York. (R. p. 63).

(f) That June 16th or 17th plaintiff in error and a number of other corporations entered into several

contracts with defendants in error, these contracts being plaintiff's Exhibits 1, 2, 3, 4 and 5 offered in evidence, in pages 72 and 73 of the record. (R. pp. 63 and 64).

(g) That among these contracts was an assignment, (plaintiff's Exhibit 3, defendant's Exhibit 6, R. p. 51), by which plaintiff in error assigned all its patents and pending applications for patents to the National Harrow Company of New York, agreeing to receive in payment therefor stock in the said National Harrow Company. (R. p. 64).

(h) That while these agreements were actually executed June 16th or 17th they were all dated April 1, 1891, and were intended to take effect as of that date.

This delay was in consequence of the escrow agreement, plaintiff's Exhibit 4, defendant's Exhibit 5, R. p. 50, by which it was provided that none of the contracts should take effect until executed by a sufficient number to control the trade of the country. (R. p. 64).

The referee thus found that all the contracts had been made at the time and in the manner claimed by plaintiff in error.

(i) Referee further found that none of the parties organizing the defendant in error were engaged in the harrow business at all. (R. p. 65).

(j) That the Nation al Harrow Company of New York assigned all its rights and interests to the defendant in error receiving therefor stock in the defendant in error and that said stock was transferred to plaintiff in error and the other licensees of the defendant in error in fulfillment of the agreements made between the said National Harrow Company of New York and said licensees. (R. p. 65).

Defendant's Exhibit 3, R. p. 47; defendant's Exhibit 6, R. p. 51.

3. In addition to these findings of fact by the referee, the undisputed testimony in the case showed, as appears from the references to the testimony in the statement of facts, that the corporation itself was organized, nominally, "for the mutual advantage of all engaged in the float spring tooth harrow business," but actually to control the manufacture and sale of spring tooth harrows throughout the United States; that neither the National Harrow Company of New York nor defendant in error had ever owned a manufactory or ever carried on the manufacturing of spring tooth harrows; that its whole purpose and aim had been to use the patents owned by defendant as a weapon against those selling or using spring tooth harrows who were not engaged in the conspiracy; that in pursuance of this scheme, it had sued for infringement of patents every spring tooth harrow manufacturer in the United States who had refused to join the conspiracy.

4. Such being the undisputed facts in the case, the question of the validity of of the contracts in question under the federal statute was simply a question of the construction of written instruments and was therefore purely a question of law and not of fact.

U. S. vs. King, 7 How. 833 at 847, 12 L. Ed. 831 at 845;

Houston & T. C. R. Co. vs. Texas, 177 U. S., 66;

The Edwin I Morrison, 153 U. S., 199 at 215;

U. S. vs. Pugh, 99 Mich., 265;

Sun Mut. Ins. Co. vs. Ocean Ins. Co., 107 U. S. 485.

5. Where the only question is a construction of one or more legal instruments the Supreme Court is not bound by the decisions of the state courts whether of law or fact.

Lane vs. Vick, 3 How. 464 at 476;
Watson vs. Tarpley, 18 How. 517;
Carpenter vs. Ins. Co. 16 Pet., 495 at 511;
Amis vs. Smith, 16 Pet., 303 at 312;
Liverpool & G. W. Steam Co. vs. Phenix Ins. Co. 129 U. S. 397;
Swift vs. Tyson, 16 Pet., 1;
Mitchell vs. Clark, 110 U. S. 633;
U. S. vs. Muscatine, 8 Wall. 575.

6. The referee found both as to the matters of fact and law that the contracts in question were valid and reasonable in their character and that a decree should be entered in favor of the complainant decreeing specific performance and injunction from further violation of the contracts and awarding damages in the sum of $20,985.

Findings of referee, R. pp. 62-68, o. pp. 98-109.

And he seems to have rested his findings sustaining the contracts on the ground of their reasonableness while conceding that they were in restraint of trade.

Findings of referee, R. pp. 65 and 67.

7. Judgment was entered in the Supreme Court of Oneida county in pursuance of these findings. of the referee, decreeing the validity of the contracts and awarding damages according to said findings.

8. It is immaterial that the referee in his findings

and the Supreme Court in its decree do not mention the federal question.

"Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision if it involve a federal question will, upon a proper proceeding, attach."

Williams vs. Bruffy, 102 U. S. 248;
Woodruff vs. Mississippi, 162 U. S. 291;
Sayward vs. Denny, 158 U. S. 180;
Bridge Proprietor vs. Hoboken L. & I. Co., 1 Wallace 116;
C. B. & Q. Ry. Co. vs. Chicago, 116 U. S. 226 at 231;
Davis vs. Packard, 6 Pet. 41;
Davis vs. Packard, 7 Pet. 276;
Davis vs. Packard, 8 Pet. 310.

"No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of the court."

Green Bay vs. M. Canal Co. vs. Patten Paper Co. 172 U. S. 58;
Dewey vs. City of Des Moines, 173 U. S. 193;
Roby vs. Colehour, 146 U. S. 153;
C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226.

"Such an adverse decision may be made merely by denying the right to an appeal."

Gregory vs. McVeigh. 23 Wall. U. S. 294;
Stanley vs. Schwalby, 162 U. S. 255;

Bacon vs. Texas, 163 U. S. 207;
Lane vs. Wallace, 26 Law Ed. 703 (not in authorized Ed.).

"When from the pleadings and record it is apparent that a state Supreme Court could not have reached the decision announced except by disposing of a federal question, the Supreme Court of the United States will review such question, although it was not put in issue by the pleadings nor directly passed upon in the opinion."

Kaukauna Water Power Co. vs. Green Bay & Canal Co., 142 U. S. 254;
Davis vs. Packard, 6 Pet. U. S. 41.

9. The question having been clearly raised by the pleadings, the Supreme Court could not have sustained the validity of the contracts without deciding against the right claimed under the federal statute and a federal question was therefore presented and decided in the Supreme Court.

II.

The federal question was properly presented to and passed upon by the Appellate Division of the Supreme Court.

1. On appeal from the Supreme Court "the appellate division of the Supreme Court shall review all questions of fact and of law."

Code of Civil Procedure (N. Y.) Sec. 1022;
National Harrow Co. vs. E. Bement & Sons, 163 N. Y. 505, printed in the supplement to this brief.

2. The federal question was raised before the

appellate division by the exceptions and appeal (R. p. 368, o. p. 575), and no complaint was ever made that these exceptions were insufficient. It was further expressly stipulated that among the questions to be determined by the appellate division should be:

(1) The validity of contracts A and B attached to the complaint, and whether or not the contracts A and B are valid under the act of congress approved July 2, 1890, chapter 647 of the first session of the fifty-first Congress."

R. p. 390.

3. The appellate division did not mention the federal question but it reversed the decision of the referee and held as a matter of law that the contracts were void as in restraint of trade.

National Harrow Co. vs. E. Bement & Sons, 21 Appellate Division N. Y., 290;
R. pp. 396-401, o. pp. 623-633.

Thus deciding as a matter of law in favor of the right claimed by plaintiff in error under the United States Statute. Defendant in error appealed from this decision to the Court of Appeals, filing notice in due form that it intended

"To bring up for review upon such appeal, each and every part of said order of judgment, and the appellant hereby stipulates that upon affirmance, judgment absolute shall be rendered against it."

R. p. 403.

III.

The effect of the decision of the Court of Appeals, although it did not mention the federal statute, was in denial of the right of plaintiff in error under it.

1. The stipulation already referred to as to ques-

tions to be determined on the appeal (R. p. 390), also controlled the matters to be determined on the appeal to the Court of Appeals, thus definitely raising the the federal question in that court; besides, as has already been shown, it had been decided by the appellate division as a question of law and for that reason was before the Court of Appeals for consideration.

2. The order of reversal was amended so as to eliminate from the consideration of the Court of Appeals all questions arising out of rulings on receiving and rejecting testimony, thus leaving all other questions covered by the stipulation open for the consideration of the Court of Appeals. (R. p. 390).

3. The case came on to be heard in the Court of Appeals and an order was entered "that the judgment of the appellate division of the Supreme Court appealed from herein be, and the same hereby is reversed and judgment of special term affirmed with costs."

R. p. 1.

4. This decision finally disposed of the case as far as the courts of the state of New York were concerned and finally determined the validity of the contracts in question, as far as these courts were concerned, thus under the rulings already cited, being in direct denial of the right claimed by plaintiff in error under the federal statute. The court in its opinion (see supplement to this brief) held that it had no jurisdiction to review questions of fact; that as to those the decision of the appellate division was final; and that the appellate division, since it had not stated in its order of reversal that it reversed the case on the facts must be conclusively presumed to have reversed it on the law and therefore to have affirmed all the findings of fact of the referee. It further said, "We are unable

to find in this record any errors of law upon which the appellate division could reverse the judgment and as the form of the order requires us to assume that the reversal was had upon errors of law we must reverse the judgment. The judgment of the appellate division should be reversed and the judgment of the special term affirmed with costs."

National Harrow Company vs. E. Bement & Sons, 163 N. Y. 505;
supplement to this brief p. 14.

5. We claim that within the decisions of this court already cited, this decision of the Court of Appeals was a denial of plaintiff in error's right under the federal statute which may be reviewed in this court.

As we have tried to show, the decision of the Supreme Court being a question merely of the construction of whitten instruments and of undisputed testimony involved a question of law and was in denial of the right. The appellate division considered it as a question of law and as such reversed the decision and decided in favor of the right. The legal question was then carried to the Court of Appeals and the decision of the appellate division was reversed and the decision of the Supreme Court affirmed. This decision of the Court of Appeals affirming the validity of the contracts could not have been made without the decision of the federal question. This court, therefore, has jurisdiction to re-examine the case.

IV.

But it is urged on the part of defendant in error that the question of the validity of these contracts under the federal statute was, under the laws of New York, a question of fact, which the Court of Appeals

could not review; that, therefore, the Court of Appeals did not determine the federal question at all and that the writ of error should be dismissed for that reason.

In answer to this we say:

1. There is nothing in the opinion of the Court of Appeals to indicate that it did not fully consider and decide the federal question and there is nothing to show that it considered that question one of fact and not of law as it is held to be under the decisions already cited in this brief.

2. If it did hold the question to be one of fact, this court is not bound by its decision. The courts of the state of New York cannot deprive an appellant of his rights in this court by erroneously holding a question of law to be a question of fact. This is abundantly established by the cases already cited. And if it were not, to hold otherwise would be to put it in the power of any state court having exclusive jurisdiction of the facts to do as the referee did in this case and by calling a conclusion of law a finding of fact, deprive this court of jurisdiction.

While this court will not give judgement as to the facts in the case, yet, when the question "decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

Dower vs. Richards, 151 U. S. 658.

In Lytle vs. Arkansas (22 How. 193 at 203), in which the Supreme Court of Arkansas had decided against a presumptive right claimed under the laws of the United States it was held that "It is not material

whether the invalidity of the title was decreed in the Supreme Court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree."

So that while the findings of fact in the case are final as to the elemental facts in the case, they are not so as to the conclusion drawn from these facts that the contract is valid, even though under the New York laws that was a question of fact.

3. But it must be conceded that there are some statements in the dissenting opinions in the Court of Appeals (supplement pp. 14-22) that would seem to indicate that the Court of Appeals did not consider the federal question at all but refused to consider it on the ground that it was a question of fact of which it had no jurisdiction. Conceding for the purpose of the argument that this is true, the question then arises as to its effect upon the rights of plaintiff in error.

It not only appears from the opinion of the Court of Appeals in this case that it had no jurisdiction to determine questions of fact and that the judgment of the appellate division was final as to all matters of fact, but it also appears that unless the order of reversal of the appellate division expressly stated that the reversal was upon the facts, it must be conclusively presumed to have been upon the law, and the necessary consequence of this presumption is that it must also be conclusively presumed that the appellate division affirmed the findings of the referee and the decision of the Supreme Court on all questions of fact, including the federal question, since in the view of the case we are now taking the federal question is treated as one of the questions of fact.

It follows from this that if the question of the validity of these contracts under the federal statute was one of fact under the laws of the state of New York, then the appellate division must be conclusively presumed in spite of its opinion to the contrary to have decided that the contracts were valid and thus to have in necessary effect denied the right claimed under the federal statute.

The judgment of the appellate division thus becomes "A final judgment or decree * * * in the highest court of a state in which a decision in the suit could be had," and such decision may be reviewed by this court.

U. S. Revised Statutes, Sec. 709;
Gregory vs. McVeigh, 23 Wall. 294, and cases cited on the question of the right to a review.

So that whether we consider that the Court of Appeals did actually pass upon the federal question or merely held that it had no jurisdiction to consider it, the necessary effect of its decision was a denial of the right of plaintiff in error and the question can be re-examined in this court.

Gregory vs. McVeigh, 23 Wall. U. S. 294.

THE SECOND QUESTION INVOLVED IN THE CASE IS, ARE THE CONTRACTS SUED UPON IN VIOLATION OF THE ACT OF CONGRESS APPROVED JULY 2, 1890, CHAPTER 647 OF THE FIRST SESSION OF THE FIFTY-FIRST CONGRESS, ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES."

It is needless in this case to set forth the evil effects of a monopoly of the manufacture and sale of an

article so essential to every person engaged in agriculture as the spring tooth harrow. It is an absolute necessity to the farmer and if any combination can be formed which can legally control the entire trade in this article, it has the farmers of the country at its mercy.

But we believe it is proper that we should call the attention of the court to the means by which this monopoly effects its purpose. As we have already seen, and shall try to show more fully hereafter, it does not stop with a direct restraint of the manufacture and sale of the implements in question, but it enforces its monopoly by compelling its licensees to assign to it all their patents and then it uses the monopoly of patents thus attained as a club by means of which to enforce its monopoly of trade, and with this club it strikes not only at the manufacturer of the article and at interstate commerce in that article, but it also strikes at every farmer who buys one of the implements for use in his own field or who uses one there. It is true that this court cannot consider the effect of a monopoly on the manufacture and use of the article, but we believe that it is right to bring to the attention of the courth these effects as emphasizing the evils of restraint of trade of which it can take notice, viz., the restraint of interstate commerce in spring tooth harrows.

It clearly appears from the references already made on page —— to the record that this company has used this club placed in its hands by its monopoly of the spring tooth harrow patents, not only against the manufacturer and the user but against the dealer as well; that its methods have been vexatious and destructive of competition in the highest degree and that if it is permitted to continue, every user of a

spring tooth harrow in the United States must pay tribute to it and every dealer, even though exclusively engaged in interstate commerce, is at its mercy.

I.

Exhibits 1, 2, 3, 4, 5 and 6 offered R. pp. 72-73, which include contracts A and B on which suit is brought, were made in pursuance of a combination or conspiracy and must be construed together.

1. The referee found that in the early part of 1890 the spring tooth harrow business was conducted by about six parties and that there had been litigation between them over spring tooth harrow patents. It further appears by the undisputed testimony (R. p. 182-3) that these persons brought suit against E. Bement & Sons for infringement of patents, and failing to succeed in the case, an amicable agreement was proposed by which the market was to be controlled. In pursuance of this agreement a contract (defendant's Exhibit 100, R. p. 292) was prepared and submitted for signature to the harrow manufacturers of the country.

Testimony of A. O. Bement, R. p. 184;
Testimony of E. H. Risley, R. p. 154.

In this contract was found the germ of the National Harrow Company. It provided that a corporation should be formed under the laws of the state of New York, to be known as the National Harrow Company; that "those engaged in the float spring tooth harrow business" should transfer to it their patents and the entire good-will of their business, and should, in exchange, receive an appointment as a licensee of the National Harrow Company; that in addition to assigning the patents and good-will they were to give

a bond for the faithful performance of their agreements, among which agreements was one that they were not "to be thereafter interested in the manufacture or sale of float spring tooth harrows, except as agents and licensees of the National Harrow Company."

Defendant's Exhibit 100, par. second, R. p. 293.

The contract also provided that those entering into the combination should be licensed to manufacture and sell "the same styles of harrows subject to uniform conditions which they were manufacturing and selling just prior to the agreement," and no others; that differences were to be adjusted by arbitration and that (and this is very important),

"Fifth. In case it shall, at any time be deemed to the mutual advantage of the interests represented, to dissolve this corporation, and terminate all contracts and licenses, and nine directors of the corporation so vote by resolution, then and in that event, the corporation shall cancel all existing licenses and contracts, and shall execute and deliver to each person, firm or corporation a transfer of all of the interests which said person, firm or corporation transferred to the National Harrow Company, and release such interests from all further obligation under any existing contract or license the intent being to vest in each person, firm or corporation who becomes party hereto, all interests which they transferred to the National Harrow Company, and each stockholder shall surrender their stock to the corporation, execute and deliver a release of all claims, and any sum of money that may remain after the payment of the debts of the National Harrow Company shall be divided to the stockholders, according to the amount of stock which each interest holds, *pro rata*, and the corporation shall thereupon be wound up and its business discontinued, and no acknowledgment of the validity of any patent shall be of any force or effect thereafter, but each interest shall stand upon the same ground, with reference to

their respective interests, as they did prior to the execution of this contract."

Defendant's Exhibit 100, par. 5, R. p. 294.

The paragraph just quoted clearly shows that the assignments provided for in the original combination were never intended as *bona fide* sales, but were executed for the purpose of vesting the legal title in the Harrow Company in trust for the true owner, to whom the sole use was reserved.

E. Bement & Sons did not sign this agreement. The company was, however, organized as appears from the statement of facts already given in this brief and the license contracts provided for by Exhibit 100 were made. One of the parties to these contracts, afterwards brought suit against the National Harrow Company to have these contracts set aside, and it was found by the court among other things,

"Sixth. That under the contracts made with these manufacturers by the defendant, the defendant has fixed a uniform price at which certain styles of harrows must be sold, which price is in no way dependent upon the cost of manufacture."

"Seventh. That in the organization of this defendant corporation, and in the making of said contracts, the plaintiffs, together with the nineteen firms and corporations who have so contracted with the defendant, have formed a combination in pursuance of a conspiracy to engross and control the price at which harrows should be sold, and to prevent competition, which acts are injurious to trade and commerce and the public good."

R. pp. 363-364.

And it was further found as conclusions of law,

"First. That the contracts set forth in the first finding of fact being made for the purpose set forth in the seventh finding of fact, are illegal and void."

R. pp. 363-364.

The contracts above referred to are defendant's Exhibit 1 (R. p. 41), defendant's Exhibit 2 (R. p. 45), and defendant's Exhibit 3 (R. p. 47). A comparison of these agreements with plaintiff's Exhibits 1 (R. p. 7), 2, (R. p. 12), 3, (R. p. 51), 4, (R. p. 50), and 5, (R. p. 72), would show that while differing somewhat in their terms they embodied substantially the same restrictions, especially as regards the manufacture and sale of the articles as the contracts in question, except that they were to continue for fifty years.

The judgment in this case was dated February 17, 1891. May 27 a meeting of the board of directors of the National Harrow Company was held and it was then decided by them and the manufacturers to destroy all the papers similar to those which had been declared illegal. This was carried out and the papers were destroyed and new contracts, being those in question in this case, were executed. References to the testimony showing the above facts are fully cited in the statement of the case already given in this brief and the facts are entirely undisputed.

It thus appears that the contracts A and B in question are not isolated instruments but that they stand as the final consummation of the scheme formed and set forth in defendant's Exhibit 100 (R. p. 292), and a comparison of defendant's Exhibit 100, defendant's Exhibits 1, 2, 3, 4 and 4½, and plaintiff's Exhibits 1, 2, 3, 4 and 5 will show the identity of the scheme and that while purporting to be made as set forth in defendant's Exhibit 100 (R. p. 292), "for the mutual advantage of all engaged in the float spring tooth harrow business," it was clearly, from the beginning, a scheme to monopolize the entire spring tooth harrow business of the country and to retain it in the hands of those by whom it was at that time carried on.

2. From beginning to end of the various contracts no money consideration was ever planned to be paid. The consideration for the assignments which were to be made was to be stock in the National Harrow Company and nothing else, and nothing else was ever given.

3. Coming now to the consideration of the contracts in question, plaintiff's Exhibits 1, 2, 3, 4, 5 and 6 in detail.

The referee finds that all these contracts were made April 1, 1891, but that they did not take effect until June 16 or 17. A reference to Exhibit 4 of these Exhibits, being defendant's Exhibit 5, p. 50, will show the reason.

This is an escrow agreement, and after naming the parties to the contract, among whom is plaintiff in error, it avers that a certain contract and license has been executed by the National Harrow Company for each of these parties and to be signed by them and that these contracts

"Shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris. * * * But in case any of the above-named persons, firms and corporations shall neglect and refuse to sign, execute and deliver said respective contracts and licenses, on or before the first day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of

said contracts and licenses, and they shall be null and void."

R. p. 50.

It thus appears from the escrow agreement that none of these contracts were intended to take effect unless all the manufacturers of the country, or sufficiently near it to practically control the trade consented to the agreement. Thus showing clearly not only that all the instruments were to take effect as one and should be construed together but also that the assignments were not intended as a full, complete and final transfer, but were conditioned on the ability of the company to control the trade.

Exhibit 6 is the assignment itself, printed in the record on page 51. It does not purport to be a new conveyance but to "ratify and confirm" the previous conveyances (defendant's Exhibit 2, R. p. 45), thus joining these contracts to the original contracts which were declared illegal. The National Harrow Company at the same time, by this instrument, released its licensees from the obligations under previous licenses. It was also agreed that all disputed questions of value should be submitted to arbitrators and that the consideration for the assignment of patents by the licensees to the National Harrow Company was to be paid up stock in the National Harrow Company to such an amount as might be agreed upon. In pursuance of these agreements and of the agreement, plaintiff's Exhibit 5 (R. p. 72), also made at the same date and a part of the same transaction, by which plaintiff in error bound itself to pay the license fee of one dollar per harrow, the two contracts in question in this case, Exhibit A (R. p. 7) and Exhibit B (R. p. 13) were made. That these were also a part of the same transaction is shown,

First. By their date, being made at the same time.

Second. By their being included in the escrow agreement.

Third. By their exact conformity in every detail, not only to the escrow agreement and the assignment (Exhibits 3 and 4), but also in every thing except a few minor particulars, to the previous Exhibits, defendant's Exhibit 100 and defendant's Exhibits 1, 2, 3, 4 and 4½.

Fourth. By the fact that they are not limited to an ordinary license to manufacture under certain patents but have several provisions not found in an ordinary license contract. Among these are,

(a) The agreement to sell at a fixed price. (R. p. 9, Pars. second and third.)

(b) The right reserved to the National Harrow Company to reduce the prices. (Par. fourth.)

(c) The obligation (Par. sixth.) by which plaintiff in error bound itself not to make any other harrows "than those which it is licensed to manufacture and market under the terms of this license." The court will observe that there is no limitation in this paragraph of the restriction. It makes no difference whether the harrows are covered by the patents in question or not. It binds itself absolutely not to manufacture or sell, either directly or indirectly, any other harrows whether patented at all or not than those which it is licensed to manufacture by defendant in error, and not to change that construction in the slightest particular, however unimportant. The same restriction appears still more forcibly in paragraph ten, the right to manufacture being there limited to "duplicates of such samples as deposited by it with, and in the possession of the treasurer of the National Harrow Company."

The referee in his findings recognizes clearly that all these instruments constituted one contract and says,

"I decide that the *contract* entered into June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant, were and are good and valid contracts founded on adequate considerations and were reasonable in their provisions." (Findings of referee R. p. 65.) Thus holding that all these contracts, including A and B constitute one contract.

Plaintiff's Exhibit 6, R. p. 73, while not made until September 9, 1891, is clearly a part also of the same scheme. In view of the decision of the New York courts already referred to declaring the previous contracts illegal as in restraint of trade, it was deemed wise to abandon the New York company and organize under the laws of New Jersey. Accordingly, as appears from the statement of facts, a new company was formed in July, 1891, and incorporated in New Jersey by a number of people, none of whom were engaged in the harrow business. This company is the defendant in error. The National Harrow Company of New York, by this agreement of September 9th, assigned to it all its rights and interests of every kind exceptone thousand dollars in cash, for the sum of $455,000 in paid-up stock of defendant in error, which stock was afterward distributed to the stockholders in the New York company to take the place of the stock held by them in that company. No cash consideration, however, passed. Indeed, all the cash of the New York company, except the sum of $1,000, already referred to was turned over to defendant in error and the final result of the transaction was that the defendant in error is the New York company having the same stockholders, precisely, as the New York company, incorpo-

rated for the same purposes, holding the same property and transacting its business in the same way, the evident purpose of the reorganization being simply to escape the effect of the New York laws.

Findings of Referee, R. p. 65.

Def. Ex. 116, R. p. 303.

4. Nearly all these facts, as appears from the statement of the case, are within the findings of the referee, and those that are not are entirely undisputed. It seems to us that the inevitable conclusion from them is that these contracts were from beginning to end a part of one scheme and that all the contracts bearing date April 1, 1891, and the assignment of September 9, 1891, must be construed together as one contract. Certainly this is true if we omit the contract of September 9th. So far as the parol evidence is concerned, it is of course true as held by this court in Bailey vs. Hannibal & St. Joseph Railway Co., 17 Wall. 96, that "such evidence cannot be admitted in the case except for the purpose of connecting the several written instruments together and of showing that they are all parts of one transaction." But it is admissible for that purpose, although the truth of this claim is, as above shown, practically conceded by the findings of the referee. Even if it were not, the language employed by this court in the case just cited, continuing from the close of the quotation made above exactly applies to the case at bar:

"Nor is it admitted that the evidence is necessary in this case even for that purpose, as the instruments themselves contain the most persuasive evidence to establish that fact and inasmuch as it appears that they were all introduced either by the complainant or by the respodent, without objection, they are properly before the court. Such being the fact, it is

quite clear that they must all be regarded as instruments *in pari materia*, and that as such they are the proper subjects of consideration in order to ascertain and determine what is the true end of the transaction and the true construction of the contract between the parties. All of these writings were executed as a means to the same end."

This end we believe it clearly appears from an examination of the contracts was to monopolize the trade in spring tooth harrows throughout the United States. To the same effect as the above case and as holding that the several instruments should be construed together, see,

Joy vs. St. Louis, 138 U. S. 1;
Livingston vs. Story, 11 Pet. 386;
Rogers vs. N. Y. & C. Land Co., 134 N. Y. 210;
Hannig vs. Mueller, 82 Wis. 241;
Beckman vs. Beckman, 86 Wis. 659.

II.

Construed together these contracts constitute an agreement or conspiracy in restraint of trade.

1. They are contingent upon the joining of all the other parties in the combine (R. p. 50, o. p. 79), and if all or a sufficient number fail to join, the contracts were not to become operative.

R. p. 51, o. p. 80.

2. The so called sale of the patents was not a sale, but a mere transfer of the legal title in trust, the beneficial use remaining in the assignor in consideration of "paid-up capital stock of the National Harrow Company, to an amount equal to the value of such patents." If the Harrow Company went to pieces, as such trusts commonly do, and as seems to have been contemplated

this one would, the legal title was to be reconveyed to the real owners.

Plaintiff's Exhibit 3, R. p. 52.

3. The license, Exhibit A, R. p. 7, purported to grant the right of sale "throughout the United States" of the articles in question under all patented rights owned "or hereafter acquired" by the National Harrow Company. It undertook also to control the sale within the United States.

R. p. 8, o. p. 10.

4. The second paragraph of the license forbids them to sell anywhere on commission or to allow any rebates from the prices fixed.

Exhibit A, R. p. 9, o. p. 12.

5. The third paragraph restrains them from selling at a less price than schedule attached to the license. This was a direct fixing of prices by the combination.

Exhibit A, R. p. 9, o. p. 12.

6. The fourth paragraph puts the prices completely into the control of the combination by giving it the right "to decrease the selling prices, and to make the terms of payment and delivery more favorable to the purchasers."

R. p. 9, o. p. 12.

7. The sixth paragraph is not a license at all but is a direct restriction of trade, for by its terms defendant is prevented from making or selling *any other* "float spring tooth harrows or float spring tooth harrow frames without teeth, or attachments applicable thereto, *than those which it is licensed to manufacture*

and market under the terms of this license, except such as it may manufacture and furnish to another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee shall be licensed by the National Harrow Company to manufacture and sell except such other style and construction as it may be licensed to manufacture and sell by the National Harrow Company."

R. p. 10, o. p. 13.

This restriction is not merely against making, but also against selling, and applies not simply to the harrows covered by the patents but forbids *any change whatever, no matter how trifling, in the construction of the harrows sold by defendant, whether the harrows defendant desires to sell are covered by the patents or not.* No matter how small or immaterial the difference, it cannot sell them even in interstate commerce if they vary in the slightest degree from those covered by the license, unless they are the exact kind which another licensee is authorized to sell and the sale is made to such licensee. That this is the exact and definite intention of this clause is further shown by its practical repetition in paragraph ten (R. p. 10, o. pp.14-15) which states that nothing in the license "shall be construed to authorize or permit E. Bement & Sons to manufacture or vend directly or indirectly, any other or different style than duplicates of such samples as deposited by it with, and in the possession of the treasurer of the National Harrow Company and embraced in this license."

8. The license was personal and not assignable. (R. p. 11, o. p. 16, par. 15.) This would have been a proper restriction if it was an actual *bona fide* license under patents in good faith owned by defendant in error; but for that very reason it operates all the more

strongly in restraint of trade in the present case. The company having secured a monopoly of practically all the patents in the country, this clause operated to absolutely prevent any new dealer from entering the company or engaging in the business without the consent of those already in it.

9. Summing up Exhibit A, the whole intent and purpose of the contract was to prevent E. Bement & Sons from making or selling any other style of harrows, whether covered by the patents or not, than duplicates of the harrows they had been making previous to assigning their rights to the National Harrow Company or from selling those at any other price than that fixed by the National Harrow Company.

10. Exhibit B (R. pp. 13 et seq.) is practically identical with Exhibit A in all its restrictions, but with the additional restriction which is very important to this case that it only grants defendant in error the right of

"Manufacture at Lansing, Mich., and *sale in all the territory embraced within the United States, lying south and west of Virginia, West Virginia and Pennsylvania.*"

R. p. 14, o. p. 20.

This limitation upon the contract makes it inevitable that every transaction under it must be one of interstate commerce, since the goods must be manufactured in Michigan and not one of them can be sold in that state. The contract, Exhibit B, is, therefore, if a restraint of trade at all a direct restraint of interstate commerce.

11. Summing up all the written instruments involved in this case, with the undisputed parol testimony connecting them together as parts of one trans-

action, and considering with them the contracts in question it seems to us that the necessary conclusion is that the whole scheme and purpose for which the National Harrow Company was organized was to control the selling price of float spring tooth harrows throughout the United States. Defendant in error never engaged in the manufacture of harrows and there is not an atom of testimony in the case to show that it ever intended to do so. The whole scheme was vicious from its inception and was simply to enable the combination to set a price on float spring tooth harrows in the United States and to worry out of existence by pretended patent suits, any dealers venturing to oppose it.

In the words of Butler, District Judge, in the National Harrow Company vs. Hench, (C. C. A., 3d circuit) 27 C. C. A., 349, considering the same contracts, precisely, except that they were made with a different party:

"It is manifest, as well from the contract as from proofs outside of it, that the purpose of the parties was to form a combination between the various manufacturers of these harrows, to prevent competition in business and enhance prices; and such is the effect of their agreement. The corporation, provided to hold the legal title of the several patents, is merely an instrument to effect this object. The prior owners are still the beneficial owners, with right to continue their business, subject only to the restraint in its management imposed by the contract. The provision for licenses is made necessary by the transfers of title, and is simply another part of the scheme for combination and control of the business of the several patentees. The result would be the same in legal contemplation if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition. That such a contract would be unlawful

seems clear. * * * * Such combinations are conspiracies against the public interests, and abuses of patent privileges."

National Harrow Co. vs. Hench, 83 Fed. 36, 27 C. C. A. 349.

12. The referee in his findings concedes that the contract is in restraint of trade but supports it on the ground that the restraint is not illegal. He says:

"I decide that the contract entered into in June, 1891, including the contracts A and B, between the National Harrow Company of New York and this defendant were, and are, good and valid contracts founded on adequate considerations and *were reasonable in their provisions, contracts A and B imposing no restraint upon the defendant beyond those which the parties had a right from the nature of the transactions to impose and accept.*"

Findings of Referee, R. p. 65, o. p. 102.

And further on

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction and that all of the contracts in evidence were and are legal, valid and binding contracts, *such as might reasonably be made* under the circumstances."

Findings of Referee, R. p. 67, o. p. 107.

13. But if there is a restraint of trade it makes no difference whether it is reasonable or not. The contracts, combinations, etc., in restrain of interstate trade or commerce which are declared to be illegal by the act of July 2, 1890, include all contracts, etc., operating to restrain trade or commerce whether legal or illegal at common law or whether the restraint is reasonable or unreasonable.

United States vs. Trans-Missouri Freight Association, 166 U. S. 290;

United States vs. Joint Traffic Association, 171 U. S. 505;

Addyston Pipe & Steel Co. vs. United States, 175 U. S. 211.

14. These contracts have repeatedly been before the courts and in every case, except the present have been held void as being in restraint of trade. The court passed upon the original contract inthe case of Strait vs. National Harrow Company (18 N. Y. Sup. 224, R. p. 365). In the decision in that case the court says of these contracts:

"In the organization of said defendant corporation, the plaintiffs, the National Harrow Company, and in the making of such contracts, together with the nineteen other firms and corporations who have so contracted with the defendant have formed a combination in pursuance of a conspiracy to engross and control the market for the sale of float spring tooth harrows and to control the price at which harrows shall be sold, and to prevent competition, which acts are injurious to trade and commerce and the public good."

R. p. 366.

The present contract exactly as involved in this case, except as to the parties with whom it was made, has also been passed upon by the federal courts.

In the National Harrow Company vs. Quick (C. C.) 67 Fed. Rep. 130. The court (Baker, J.) said:

"It seems to me that such a combination is illegal, and that its purposes are violative of sound public policy. The common law forbids the organization of such combinations composed of numerous corporations and firms. They are dangerous to the peace and good order of society, and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and by their aggregate power and influence, imperil the free and pure administration of justice."

This case was carried to the Circuit Court of Appeals where the decision was affirmed although it was held in the case that these facts offered no defense to an action for an infringement of a patent.

National Harrow Company vs. Quick, 74 Fed. Rep. 236, (20 C. C. A. 410).

In National Harrow Company vs. Hench, et al, (C. C.) 76 Fed. Rep. 667, the court (Acheson, J.) says:

"Now it is quite evident to me, as well by the papers themselves as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained."

The above case was appealed to the Circuit Court of Appeals for the Third Circuit and the decision was affirmed. The language of the court which has already been printed in this brief (p. 45) being even stronger than that quoted above.

83 Fed. 36, (27 C. C. A. 349).

In National Harrow Company vs. Hench, 84 Fed. Rep. 226, the court (Coxe, J.) says of these contracts:

"The complainant was created solely to effectuate the purposes of the combination. The patent in suit being transferred as part of the unlawful scheme, can it be possible that, based upon such a title, the complainant can levy tribute upon the defendants and thus accomplish by indirection the very object of the monopoly more effectually than if the court had not declared the whole transaction void."

In the present case the appellate division (Follett

J.) after very fully considering all the facts regarding these contracts said of them:

"It seems to me that the provisions of the contracts authorizing in effect the plaintiff to fix the price at which harrows shall be sold during the existence of these patents, and providing that the defendant shall not directly or indirectly manufacture or sell any float spring tooth harrows or float spring tooth harrow frames without teeth or attachments applicable thereto other than those it is authorized to manufacture by the terms of the contracts are void as aginst public policy. No matter what improvements are made in float spring tooth harrows this defendant and all other licensees of the plaintiff are prohibited from adopting them and they are all confined to the manufacture and sale of float spring tooth harrows and covered by the eighty-five patents specified in the contracts. These provisions not only stifle competition between the plaintiff's licensees but effectually prevent them from attempting to make any improvements in harrows."

From this decision defendant in error appealed, as we have already seen, to the Court of Appeals and it was reversed, thus negativing the above conclusions reached by the appellate division.

But even in the Court of Appeals these contracts were not allowed to pass unchallenged. The dissenting opinion by Justice Cullen says:

"In my opinion the defendant conclusively proved by uncontroverted evidence that the two agreements declared by plaintiff were made in pursuance of the prior agreement referred to in the answer and the written instruments, construed together, show an illegal combination."

After citing some of the cases referred to above, he continues:

"In the views expressed in those cases I entirely concur."

Appendix to this brief, p. 15

It thus appears that every court before whom these contracts have come has held that they are a grossly oppressive restraint of trade, and in every case except the case at bar, has held them void for that reason.

15. The case of Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211, is very important in its bearing upon this class of contracts. In that case a large number of manufacturers of iron pipe entered into a combination or agreement in regard to the manufacture and sale of cast iron pipe, by which it was agreed that within certain territory only certain manufacturers should bid on contracts or that if any other of the manufacturers in the combination did bid they should do so at a higher price than the one to whom the contract should go under the terms of the agreement. The court held that this constituted an agreement in restraint of interstate commerce; that it was not necessary that the monopoly should be complete or that the prices charged should be unreasonable and says:

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect to articles manufactured by any of the parties to it to be transported beyond the state in which they were made."

The court distinguishes this case from the case of United States vs. E. C. Knight Co., 156 U. S. 1, and says:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute."

And further on:

"It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the state makes the transaction a part of interstate commerce."

And again:

"The commodity may not have commenced its journey, and so may still be completely within the jurisdiction of the state for purposes of state taxation, and yet at that same time the commodity may have been sold for delivery in another state. Any combination among dealers in that kind of commodity, which in its direct and immediate effect forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, would, in our opinion, be one in restraint of trade or commerce among the states."

The whole case is very instructive and when taken in connection with the other authorities cited and the various contracts and facts as presented by the undisputed testimony, we think justifies the conclusion that these contracts are also not only in restraint of trade but of interstate commerce.

III.

Was the trade or commerce restrained by these contracts interstate?

We contend that there can be no question as to this for the following reasons:

1. The bill of complaint was filed to restrain acts of interstate commerce.

It avers "That the defendant is a corporation duly

organized and doing business at the city of Lansing, Mich."

Complaint, R. p. 3, o. p. 3.

It alleges as violation of the contracts in question that plaintiff in error has

"Sold and delivered harrows, harrow frames and attachments applicable thereto, and delivered the same to the parties purchasing the same, to wit, to J. H. Wilhelm, Myerstown, Pa., to be sold on commission; and has, in violation of the terms of said license, allowed rebates or discounts not authorized by the terms of said license, to J. H. Wilhelm of Myerstown, Pa., and to Coleman & Horton, of Nichols, Tioga county, N. Y."

Both these transactions were clearly acts of interstate commerce, the goods being manufactured in Michigan, and sold by plaintiff in error in Pennsylvania and New York.

2. The contract, Exhibit A, attached to the bill of complaint, by its express terms, relates to interstate commerce, viz., to the right

"To use in its business in the manufacture at Lansing and sale throughout the United States of float spring tooth harrows, harrow frames without teeth and attachments applicable thereto," the patents in question.

The sales controlled by the license agreement are thus all the sales made by plaintiff in error in the United States whether interstate or not.

Ex. A, R. p. 8.

3. That the commerce restrained was interstate also follows as a necessary consequence from paragraphs first to seventh, inclusive, of Exhibit A. These paragraphs contain various restrictions and none of them have any limitation which would restrict their application to the local trade.

Ex. A, Pars. 1 to 7, R. pp. 8-10, o. pp. 11-13.

4. The sixth paragraph of the bill restrains them from selling any different float spring tooth harrows than those they are licensed to manufacture, no matter whether the harrows they desire to sell are patented at all or not and it applies as fully to interstate trade as to local. The same thing is true of paragraph ten.

Ex. A, Pars. 7 and 10, R. p. 10. o. pp. 13 and 14.

5. Paragraph fifteenth makes it impossible for them to transfer their rights even with all these restrictions to other parties. This has already been commented on.

Plaintiff's Ex. A, Par. 15th, R. p. 11, o. p. 16.

6. Plaintiff's Exhibit B is by its very terms expressly limited to acts of interstate commerce and nothing else, since the rights granted under it are

"The manufacture at Lansing, Mich., and sale in all the territory embraced within the United States, lying south and west of Virginia, West Virginia and Pennsylvania."

This contract thus restrains plaintiff in error from selling at all in any part of the United States outside of the boundaries fixed by the contract. It also applies restraints which are substantially identical with those of Exhibit A to all sales that the plaintiff in error is authorized to make within that territory.

7. Schedule B attached to Exhibit A not only fixes the price and terms of sale but directly restrains interstate commerce. It provides that

"A maximum discount of forty-two (42) per cent, may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England states; also states of New York, Pennsylvania,

New Jersey, Deleware, Maryland, Virginia and West Virginia.

"A maximum discount of forty-five (45) per cent may be allowed on all sales made in the territory throughout the United States not mentioned above."

Ex A, R. p. 12, o. p. 18.

Under this provision, for instance, a harrow must be sold at one price in Springfield, Pa., and at another price in Conneaut, Ohio, directly opposite.

8. The undisputed testimony shows that the sales desired to be restrained were acts of interstate commerce by defendant in error.

Testimony of Emmet Coleman, R. p. 78;
Testimony of Hiram Ellis, R. p. 81;
Testimony of Willis E. Waite, R. p. 87.

All these witnesses were introduced by defendant in error for the purpose of maintaining its case.

Arthur O. Bement, on *cross-examination* directly testified that plaintiff in error was largely engaged in interstate commerce.

R. p. 247, o. pp. 385-6.

The same conclusion follows from the sales to George H. Tyler, (R. p. 282, o. pp. 441-443) also from the testimony as to the different firms and corporations engaged in the manufacturing and selling of float spring tooth harrows in the United States.

Testimony of A. O. Bement, R. p. 183, o. pp. 287-289.

9. The referee in his findings made no distinction between sales of interstate commerce and other sales and awarded damages for all sales in violation of either Exhibit A or Exhibit B.

Findings of Referee, R. pp. 66 and 67, o. pp. 105-106.

IV.

The United States patent laws afford no protection to this monopoly.

It is contended that contracts A and B are simply licenses under patents owned by the National Harrow Company and are therefore, entirely within its authority as owner of the patents under the monopoly granted by the patent laws. This is not true for the following reasons:

1. The contracts are not simply licenses under patents. Both contracts A and B, as has already been shown, go far beyond the legitimate scope of a license contract.

(a) Patents are granted not to stifle but to encourage invention. Paragraphs six and ten of both Exhibits A and B not only do not permit but stifle invention, for they forbid the licensee to make any improvements.

(b) The same paragraphs are a direct restraint of trade, entirely outside the scope of any proper license contracts for they forbid the sale by the licensee of any other harrow whether patented or not, or even any other part of a harrow.

(c) Paragraph eight goes still further and binds them not to

"Alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applied thereto, which it is authorized to manufacture and sell under this license in any part or portions thereof which embody any of said inventions covered by said letters patent or any of them, or any re-issues thereof."

This restriction does not stop with the patented features but they are not to alter in any manner, however immaterial the elements embodied in the claims of the patent.

(d) The same thing is true of paragraph nine, in which the National Harrow Company agrees that it will not license any one else to manufacture harrows "of the peculiar style and construction" of the harrow deposited with them by the plaintiff in error.

(e) By the eleventh paragraph any departure from the terms of the license, however slight, authorizes the National Harrow Company to treat the licensee as an infringer. This provision is altogether outside the scope of an ordinary license contract since it is a well settled rule that a failure to pay royalties does not authorize the licensor to treat the licensee as an infringer.

2 Robinson on Patents, Sec. 821.

(f) The complete control over prices reserved to the licensor, while possibly not entirely inconsistent with a *bona fide* license contract, goes very far to support our contention that this is nothing of the kind.

2. A patent is a species of property the same as anything else, and being such, there may be a monopoly of patents just as well as there may be a monopoly of horses, or of wheat, corn or coal. It is, of course, true that a man has a right to purchase and to hold in his own right all the patents in force relating to spring tooth harrows, and having done so, he may control them as absolutely as the original patentee. But he occupies the same position towards every other species of property. He may, with equal right, buy all the wheat or iron or coal or horses or land or other property in the country, fixing his own price on it and

the rest of the world must take it at that price or let it alone, always provided his title be not tainted by unlawful acts or designs which will defeat it altogether.

But this is far from saying that the courts will aid him to acquire the title simply for the purpose of dictating the prices, still less that he can conspire with others to do so.

The same thing is true of a monopoly of patents.

"Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. * * * * Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage."

National Harrow Company vs. Hench, 83 Fed. 36, 27 C. C. A. 349 at 351.

3. A monopoly of patents, must, in the very nature of things, be in violation of the federal anti-trust law.

A patent controls not only the manufacture and use, neither of which will bring it within reach of the law, but it also controls the purchase and sale, and by its agency the members of the combination have it within their power to forbid any interstate commerce of any kind in the articles covered by the patents.

4. By reason of this very fact a monopoly of patents

is as much more vicious and vexatious in its results upon a community as the powers given under the patent laws exceed those derived from the mere ownership of ordinary property. By means of the weapon thus placed in their hands, the members of the combination have at their mercy, if the combination be sustained, not only the manufacturer and the dealer engaged in interstate commerce in the articles in question, but every retail dealer,—more than that, every purchaser and every one who uses a spring tooth harrow in the field, for the patent laws forbid under equal penalties, manufacture, sale and use.

And we submit that the undisputed testimony in the case and the necessary conclusion from the contracts themselves, is that the sole purpose for which the National Harrow Company was organized was to enable it to avail itself in the fullest degree of this weapon.

V.

Plaintiff in error, therefore, contends:

1. That there is a federal question properly raised in this case over which this court has jurisdiction.

2. That the contracts in question constitute in connection with the other contracts made at the same time and a part of the same transaction, a "contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states" within the meaning of chapter 647 of the acts of the fifty-first Congress, "being an act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890.

3. That being contracts in violation of a positive statute, they will not be enforced by a court of equity

and that a decree should be entered dismissing the complaint.

EDWARD CAHILL,
CLARK C. WOOD,
Solicitors for Plaintiff in Error.

Appendix.

OPINION OF COURT OF APPEALS.

NATIONAL HARROW COMPANY,

V.

E. BEMENT & SONS.

PARKER, C. J. The printed "case" is not without indications that the learned justice who wrote for the appellate division intended a reversal upon the facts, but through inadvertence of the court in making or counsel in preparing the order of reversal, it does not show that the reversal was upon the facts, and hence this court is required by statute to presume that the judgment was not reversed upon a question of fact, but upon the law. Code § 1338. That section is in substantially the same form now as when the Code of Civil Procedure was enacted in 1876. The amendment of 1895, to which reference will be made later, in no wise affected an order which did not state that the reversal was upon the facts. In very many cases the court has been invited to review judgments where it was apparent that a mistake had been made in the order of reversal, but it has steadfastly adhered to the command of the statute, and refused to sustain the judgment unless it appeared that there was an er-

ror of law upon which the general term or the appellate division, as the case might be, could have rested its reversal. Among these cases may be found the following: Weyer v. Beach, 79 N. Y. 409; Davis v. Leopold, 87 N. Y. 620; Hannigan v. Allen, 127 N. Y. 639, 27 N. E. 402; Furner v. Seabury, 135 N. Y. 50, 31 N. E. 1004; Mack v. Colleran, 136 N. Y. 617, 32 N. E. 604; Riendeau v. Bullock, 147 N. Y. 269, 41 N. E. 561; Bomeisler v. Forster, 154 N. Y. 229, 48 N. E. 534, 39 L. R. A. 240; Snyder v. Seaman, 157 N. Y. 449, 52 N. E. 658; Petrie v. Trustees, etc., 158 N. Y. 458, 53 N. E. 216; People v. Adirondack Ry. Co., 160 N. Y. 225, 54 N. E. 689; Gannon v. McGuire, 160 N. Y. 476, 55 N. E. 7; Lannon v. Lynch, 160 N. Y. 483, 55 N. E. 5; Spellman v. Looschen, 162 N. Y. 268, 56 N. E. 741; Shotwell v. Dixon 163 N. Y. 43, 57 N. E. 178. Everyone of the cases cited is consistent with the requirement of the statute, and not only holds that the statute limits the court in such a situation to the review of questions of law presented by exceptions, but the various questions of law which may be passed upon on such a review have been considered, and it has been decided that they are confined to rulings touching the admission and rejection of testimony, to the question whether the conclusion of law is supported by the facts found, and also whether any material finding of fact is without evidence to support it. Not only has the court in all the cases I have referred to failed to discover any other question of law than those just mentioned, but this court has said again and again, and very recently, as I shall soon point out, that there are no other questions of law which can arise in such a situation as this record presents. Before

referring to the special discussion of this subject in the recent decisions of this court, attention is invited to the fact that section 1338 as originally enacted had one more sentence than at present. The section formerly read as follows: "Sec. 1338. Upon an appeal to the court of appeals from a judgment, reversing a judgment entered upon a referee's report, on a decision of the court, upon a trial without a jury; or from an order granting a new trial upon such a reversal; it must be presumed, that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears, in the body of the judgment or order appealed from. In that case, the court of appeals must review the determination of the general term of the court below, upon the questions of fact, as well as the questions of law." Formerly, therefore, it was the duty of this court, where there was a reversal upon the facts, to review the questions of fact as well as the questions of law; but after the adoption of the new constitution, which took effect January 1, 1895, and which provided that the jurisdiction of this court, "except where the judgment is of death, shall be limited to the review of questions of law," the legislature of that year, for the purpose of conforming the practice to the mandate of the constitution, amended section 1338 by striking out the last sentence. When that was done, the last vestage of the right of this court to review the facts of a trial had before a court or referee, whatever the form of the order of reversal, was swept away. The authorities down to that time consistently held that the facts should not be reviewed save when the reversal was in terms upon the facts, as an examination of the

cases cited above will show; and when that right was taken away by repeal of the provision authorizing such review, it would seem that the constitution and the statute together had securely barred our entrance to the record for the purpose of examining the evidence and determining what judgment such evidence calls for, and deciding the appeal accordingly. The learned counsel now proposes that we shall do just that, and nothing more. The proposition is presented differently, of course, and far more seductively, but reflection shows that the result aimed at is not and cannot be less than that. If, in the absence of decision, there were room for argument as to whether the effect of the repeal of the provision of section 1338 authorizing this court to review the facts where there is a reversal upon the facts was to invest the court with a power which it did not have at the time of such repeal, namely, the power to review the facts where the reversal was not upon the facts, it cannot be listened to now, for that question has been otherwise decided, and therefore is no longer an open one.

The court has had before it since the amendment of 1895 a number of cases where the extent of the power of review in this court where the reversal of a referee or trial court is not upon the facts has been considered. In Bomeisler v. Forster, supra, the court, speaking through Judge Gray, and after calling attention to the fact that the exception to the decision made it the duty of the appellate division to review all questions of fact and law, stated the rule as to the effect of an order of reversal which is silent as to its grounds to be that this court is bound to presume that the reversal was upon ques-

tions of law. The opinion then proceeds to state the limit of our authority in such a case in the following words: "Our review is, therefore, confined to the consideration of whether, upon the decision made by the trial court upon the facts, the legal conclusion followed that the plaintiff was entitled to the equitable relief awarded him, and, if there was no error in that respect, whether there were errors of laws committed in the rulings upon the trial, which would in any event, have justified a reversal of the judgment, and rendered a new trial necessary." In that decision the facts were not separately stated, but it was what is known as a "short decision," and the court considered the effect of its substitution for separate findings of fact, and reached the conclusion that such a decision has in its support the presumption that all the facts warranted by the evidence and necessary to support the judgment were impliedly found. In support of that proposition the court cited the case of Trustees of Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876. The case of Petrie v. Trustees, etc., supra, was a case where the referee's report was also general in form, and the court followed the decision in the Bomeisler and Amherst College Cases in holding that all the facts warranted by the evidence and necessary to support a judgment in such a case were impliedly found by the referee, and it adopted the rule of the Bomeisler Case as to the boundaries of the right of review in this court where the order of reversal does not state that it is upon the facts. The form of the decision was the same in the People v. Adirondack Ry. Co., supra, and this court, following the cases already referred to, Judge Vann writing, said: "It must be presumed that all the

facts warranted by the evidence and necessary to support the judgment were found by the special term and that the reversal by the appellate division was based wholly upon errors of law, the facts standing approved by that court." This case was cited in Gannon v. McGuire, supra, in support of the proposition, in which all of the court agreed, that, "according to the order of reversal, the learned appellate division did not disturb the facts presumed to have been found by the trial court, which include all facts warranted by the evidence and necessary to support the judgment." And Judge O'Brien, in Lannon v. Lynch, supra, after referring to the requirement of section 1338 of the Code in a case where it does not appear in the order appealed from that the judgment was reversed upon the facts, said: "There is no such statement in the order now before us. It simply states that there was a reversal and a new trial directed. We are commanded by the statute to treat the decision as one not interfering with the facts found at the trial." Spellman v. Looschen, supra, was a case in which the record disclosed no exceptions taken to the admission and rejection of testimony, and where undisputedly the conclusion of law followed from the facts found, and so Judge Landon said: "The only question of law presented by the record for our review is whether the learned trial court found, without evidence to support it, any fact material to the judgment."

I have called attention to a sufficient number of cases to show not only that the form of the order is a familiar one in this court, and ofttimes the subject of consistent adjudication, but also that the form of the decision under review is not strange to this court, for it has received careful consideration,

since the amendment of section 1338 of the Code in 1895, and the adoption of the new constitution depriving this court of the jurisdiction to review facts with the exception therin provided, and such decisions have been almost universally made by a unanimous court, and, without exception, they deny the power of this court, in such a case as this, to search through the record for facts not in harmony with the referee's or the court's decision, and to incorporate them as facts into that decision in order to support a determination by this court that the conclusion of law of the referee was not supported by the facts found by him; and we should be governed by these decisions even if, according to our present view, they were not well considered, for they have been consistent with each other from the beginning, as the records, covering now more than half of the volumes of the decisions of this court, show. It is true that in none of these cases did the court say that in a short decision an omission to find a material fact not requested does not present an error of law, and for the reason, doubtless, that in all the struggles to avoid the rigor of section 1338, it has never occurred to the minds of counsel before to press such a claim on the attention of the court. But when in various cases this court, as in the Bomeisler and Petrie and other cases, undertook to state the boundaries of our authority to review where the reversal is not upon the facts, and in express terms said that the only questions of law which we may review must relate to the admission and rejection of testimony, to the question whether the conclusion of law is supported by the facts found, or whether any material finding of fact is without any evidence to support

it, we necessarily excluded the question under discussion, with all others not named; that is, we decided that certain questions can be reviewed and that no others can, and to the latter class belongs the alleged question of law which we are considering. Assuming, however, for the sake of argument, that the question has never been decided,—that it is as open for decision as if the dozens of cases which have been before this court during the last five years had never been decided,—and it seems to me quite clear, to say the least, that it suggests no error in the decisions made. Now, in what does this alleged error of law consist? It is said to consist in the omission of the referee to find a material question of fact which was conclusively proved. If that constitutes an error of law, then in every case where the reversal is not upon the facts, the attention of this court will be invited to an investigation of the record to see whether some fact was not conclusively proved which does not appear in the decision, and it will be strange indeed if it cannot be found, whereupon the ingenuity of counsel will be exerted to convince us that it is a material fact. What, then, would be left of the command of section 1338 of the Code? Nothing, practically; for experience teaches that we should become investigators of the facts, and in cases such as this, where inferences of fact may be drawn from facts and circumstances proved, it will be argued that that the fact was conclusively proved.

But, passing the effect of such a decision, we come to a consideration of the question whether an omission to find a fact not requested constitutes an error of law. The precise form in which the proposition is presented is as follows: "Where a fact

is pleaded and conclusively proved on a trial, which is fatal to the judgment rendered, the failure to find that fact is an error of law for which the judgment is properly reversed by the appellate division as erroneous in law." There are several answers to this contention. One is that it cannot be legal error to omit to insert in a report of a referee, or in a decision of a trial court, a material finding of fact, the finding of which has not been requested, for the reason that the statute explicitly asserts that this need not be done. Code, §1022. That section provides in terms that a court or referee may state separately the facts found and the conclusions of law, or may file a decision stating concisely the grounds upon which the issues have been decided. Clearly, it cannot be seriously contended, when the statute provides that the facts need not be separately stated, but that it is sufficient to state concisely the grounds upon which the issues have been decided, that an omission to find a material fact in a short decision constitutes error of law. In other words, that, in doing what the law expressly permits, error of law is committed by a trial court or a referee. In this case the referee filed a decision stating concisely the grounds upon which he decided the issues. In so doing, he conformed to the requirements of the statute, and, whatever errors he may have committed in passing upon either question of law or fact, he did not commit an error of law in omitting to incorporate into his decision every material finding of facts established conclusively or otherwise by the evidence.

There are still other answers to the contention made, one of which is that there is no exception which presents for our review any such question

as that suggested. It is true that formerly it was held to be an error of law to omit to find a fact requested when conclusively established, and that an exception taken to such a refusal presented an error of law for review in this court. But there is no such request here, and no exception taken to a refusal to find; and, furthermore, it ever was the law in this state that an omission to find a fact not requested constituted error of law. The presentation of requests to find finally became so burdensome to the courts, and so unfruitful in results, that in 1894 section 1023 of the Code was literally swept away. Now, upon the happening of that event, the rule of law which had been builded by the courts, and subsequently incorporated into the Code, that a refusal to find a fact requested, which was conclusively established by the evidence, if excepted to, constituted error of law reviewable in this court, either survived the repeal of section 1023, or passed away with it. If the rule of law formerly in vogue survived the repeal of section 1023, then the law upon that subject is that a request for a finding must be made and refused, and an exception noted, in order to present a question of law for this court. Clearly, no such thing happened in this case. If the rule of law formerly obtaining went out of existence with the repeal of 1894, it is as dead as the section repealed, and can no more be invoked in this court than the repealed section. It is my view that the repeal of section 1023, considered in connection with the repeal in the year following of section 993 and various amendments to other provisions of the Code by chapter 946 of the Laws of 1895 (a chapter in part made necessary by the amendment of

the constitution affecting the powers of both this court and the appellate division), operated to wipe out of existence the practice touching the review of findings of fact in this court. The legislature was of the opinion that only radical measures could accomplish that result, and hence the absolute repeal of section 993, which read as follows: "Upon the trial of an issue of fact by a referee, or by the court, without a jury, a refusal to make any finding whatever, upon a question of fact, where a request to find thereupon is reasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law, within the meaning of the last section." What possible purpose could the legislature have had in repealing that section except to take away from this court the temptation to follow in the beaten paths of decision? Now, however, although the statute which it was supposed was our guide in such cases has been repealed, we are invited to go a step further than either the statute or the decisions ever went, and hold that a mere omission to make a finding of fact, although not requested, constitutes an error of law reviewable in this court.

But I forbear further discussion of this question. The suggestion is also made that, if it must be held that the effect of the amendment of section 1338, considered in connection with the repeal of section 993 and the various amendments made to other sections of the Code, was to prohibit the court from holding that a failure to find any material fact proved presents an error of law, there is nothing to prevent the court from holding that a failure by the referee or trial court to give effect to a fact proved is an error of law. To my mind that suggestion

needs no other answer than that during all the years that our system of practice has been developing this court has neither held nor said that a failure to give effect to a fact proved, but not found, constitutes error of law, but, on the contrary, has stated what the questions of law are that they may be reviewed, and has thus excluded this and other alleged questions of law that may be hereafter evolved. Again, it is not pretended that under the practice existing prior to the repeal of section 993 there was any such rule of law in existence, but it is in effect argued that, the right to say whether it was error to refuse to find a particular fact having been taken away from this court, it should now be held that the result was to confer upon this court the right to examine the entire record; and if, as a result, we find that a certain fact was proved, which had it been given effect, would have led to a different conclusion, we may hold that an error of law was committed. There is nothing in any amendment to the Code suggesting such a purpose on the part of the legislature. On the contrary, there is to be found therein conclusive evidence that the legislature intended to cut off all possibility of a review of facts by this court, whether under the guise of a review of questions of law or otherwise. The constitution that went into effect January, 1895, sought to prohibit this court from reviewing questions of fact, and to that end, in terms, limited the jurisdiction of the court to questions of law. It also provided that the legislature might "further restrict the jurisdiction of the court of appeals and the right of appeal thereto." In the presence of this situation, the legislature set about the enactment of such legislation as should give effect to this new

policy of the organic law, which intended to make a court of great dignity, consisting of five justices of the supreme court, called the "appellate division," the court of final review as to all questions of fact, and in many cases as to questions of law as well. And as section 993 afforded the only statutory opening through which this court could enter upon a review, wholly or partially, of the evidence when the reversal of a court or referee was upon the law, it was repealed; not amended, but effaced from the pages of the Code. Other amendments to various sections of the Code were made by the same act (chapter 946 of the Laws of 1895), but all that were germane to this question tended in the same general direction. I shall not stop, however, to analyze them, but content myself with the assertion made, as there is no room for controversy as to the tendency of the amendments. Our duty in the premises is plain. It is to observe the boundaries of our jurisdiction faithfully, and thus to carry into effect the scheme which the framers of the constitution devised and the people approved. And, while thus observing them, we shall have the satisfaction of knowing that harm will not result to litigants because we are prevented from reviewing facts, for section 1022 provides that "the appellate division of the supreme court shall review all questions of fact and of law." It may be that occasionally in the future as in the past effect may not be given to the intentions of the court by the draftsman of the order or judgment but the remedy is to be found in an application to the appellate division to so amend the order or judgment as to express the will of the court, not in an appeal to this court to assume jurisdiction over

questions that have been advisedly taken from it. We are unable to find in this record any errors of law upon which the appellate division could reverse the judgment, and, as the form of the order requires us to assume that the reversal was had upon errors of law, we must reverse the judgment. The judgment of the appellate division should be reversed, and the judgment of the special term affirmed, with costs.

CULLEN, J. (dissenting). This action is brought on two written agreements annexed to the complaint, under which the defendant obtained licenses from the plaintiff, which was the owner of certain patents, to manufacture patented articles, and in consideration thereof agreed to pay a stipulated royalty, and to abstain from manufacturing other articles. The defendant answered, setting up, among other things, that the two license agreements declared on were a part of and made in persuance of another agreement annexed to the answer, the purpose and object of which was to limit and control the production and market price of strong-tooth harrows in the United States, which contract, it was alleged. was illegal and void as in restraint of trade. The referee rendered judgment for the plaintiff, making the short form of decision authorized by section 1022 of the Code of Civil procedure, in which he ignored the agreement set forth in the answer. The case states that it contains all the material evidence. On appeal the appellate division reversed the judgment and ordered a new trial, but, as the order does not declare that the judgment was reversed upon the facts, under section 1338, it must be assumed that

it was based on errors of law alone. In my opinion, the defendant conclusively proved by uncontroverted evidence that the two agreements declared on by the plaintiff were made in persuance of the prior agreement referred to in the answer, and the written instruments, construed together, show an illegal combination. This was so held in Harrow Co. v. Quick (C. C.) 67 Fed. 130; Same v. Hench (C. C.) 76 Fed 667; Id., 29 C. C. A. 681, 85 Fed. 991. In the views expressed in those cases I entirely concur, but it would be unprofitable to pursue the discussion in this respect, as the majority of the court hold that we cannot look into the record to see if the defendant has conclusively proved its defence, but are confined to the inquiry whether the facts found by the referee in his decision have the support of evidence, and, if there is evidence to sustain them, whether they authorize the judgment rendered. From this view of the practice and the power of the court I am constrained to dissent. The difference in opinion between the majority of the court and myself is occasioned by the repeal of section 1023 of the Code and the amendment of section 1022, which authorizes the short form of decision. We all agree that the reversal by the appellate division in this case can be supported only for some error of law committed by the trial court. The difference between us is as to what is an error of law. I think that where a fact is pleaded and conclusively proved on the trial, which is fatal to the judgment rendered, the failure to give effect to that fact is an error of law for which the judgment is properly reversed by the appellate division as erroneous in law. Of course, if there is a conflict of evidence, or if the

evidence admits of different inferences, or the credibility of witnesses is involved, the question is one of fact and not of law; also, of course, this rule applies only to issuable or traversable facts, and not to facts which are merely evidence from which the existence of other facts may be inferred. In the present case it is not necessary to go even to the extent stated, for the defense rests on uncontroverted documentary evidence. In determining the effect of the amendment of section 1022 and the repeal of section 1023, it is vital to bear in mind the distinction between the questions of law and the practice that may be necessary to raise those questions on appeal. If an action is brought on a promissory note, and the statute of limitations is pleaded, it can hardly be denied that the question of what limitation applies is one of law, and that an instruction that it requires the lapse of 10 years to bar the claim would be erroneous. If no exception, however, were taken to the ruling of the trial court in this respect, the defendant would be precluded from taking advantage of the point on appeal, not because the question was not one of law, nor because the ruling was not erroneous, but simply because he had not adopted the proper practice to correct errors. It is a mistake to suppose that a failure to give effect to a defense or to a cause of action conclusively proved was made an error of law solely by virtue of section 1023 of the Code. On the contrary, the principle that, where the facts concerning an issue which necessarily controls the disposition of a cause are uncontroverted, a question of law only is presented is as old as the maxim, "Ad quæstionem facti non respondent judices, ad quæstionem legis non re-

spondent judices, ad quæstionem legis non respondent jurartores," a maxim the Latin of which has been criticised, but its doctrine in civil cases never impugned. Under the old Code there was no statutory provision for requests to find, yet as early as Pratt v. Foote, 9 N. Y. 463, it was said, "Where, however, there is no conflict of evidence, and no dispute about the facts of the case, the conclusion to be drawn from these facts is a question of law." In that case a judgment on a promissory note was reversed because the court was of the opinion that the facts proved amounted to a payment. In Mason v. Lord, 40 N. Y. 476, it was said by Graver, J.: "When it is the finding of a fact without any evidence, or the refusal to find a fact proved by uncontroverted evidence, it is a legal error which is available in this court." It is conceded that the first proposition remains true to this day. Shotwell v. Dixon, 163 N. Y. 43, 57 N. E. 178. It is clear that the second proposition was equally true up to the time of the amendment of the Code referred to. See Beck v. Sheldon, 48 N. Y. 365; Bryce v. Insurance Co., 55 N. Y. 244; Kaehler v. Hughes, 148 N. Y. 507, 42 N. E. 1051. It is true that in the early history of this court the practice was established that to take advantage of an error in failing to find a fact conclusively proved it was necessary that a request to find that fact should be made. But the request to find did not create the error of law. It was merely prescribed as the proper way of raising the question of law upon appeal, and in this respect is analogous to an objection and exception. On this question the case of People v. Dederick, 161 N. Y. 195, 55 N. E. 927, seems controling. In that case, which was a pro-

ceeding to review an assessment for taxation, the judgments of the special term and appellate division were reversed in a part because it appeared by undisputed evidence that a portion of the indebtedness for which the relater claimed exemption was incurred for the purchase of the good will of another company. There was no finding in the courts below of such a fact, but this court said, per Haight, J.: "The testimony upon this subject is undisputed, and we are, therefore, of the opinion that a question of law is presented. * * * This testimony, we think, permits us to properly treat as a fact in the case that at least one-half of the increased bonded indebtedness created in 1893, to wit, $150,000, was contracted for the good will of the business of the company then purchased by the relator." Since the constitutional amendment of 1895, the jurisdiction of this court has been limited to the review of questions of law. If it is the request to find, and not the state of the proof, that creates the question of law, I cannot see how this court could have modified the judgment, for in the proceeding there was no request to find, nor was any request permissible. In these respects the condition of a special proceeding and that of an action where a short decision is rendered are the same. Bearing in mind the difference between questions of law and questions of practice, as to the proper method of raising questions of law, we now come to the effect of the Code amendments. By section 1022, "whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions,

the appellate division of the supreme court shall review all questions of fact and of law." If I am right in the view that it is the state of the proof, and not the request to find, that creates the question of law, then this provision would seem to give the appellate division ample power to reverse this judgment as erroneous in law, provided the proof of the illegality of the contract was conclusive an uncontroverted. The general exception is by the Code made a substitute for all other methods of raising questions of law. The repeal of section 1023 of the Code is not in conflict with these views. That section went beyond the state of the law at the time of its enactment. It made a new error of law; that is, a failure to pass upon and decide one way or the other a material question of fact, where the evidence was conflicting. James v. Cowing, 82 N. Y. 450. The repeal of the section only abolished the question of law which it had created. It does not affect a case where the proof is uncontroverted. If this action had been tried before a jury, as it well might have been, so far as the matter of damages is concerned, the defendant would undoubtedly have had the right, by a motion to direct a verdict in its favor, to have the question whether, upon all the evidence in the case, the illegality of the contract was not conclusively proved, decided as a matter of law. I do not think that it should lose that right because the case has been tried before a referee, nor do I believe that a change in the mode of trial from a court and jury to a referee or court alone can transmute a question of law into one of fact. The practice which the court is about to establish by its decision in this case I fear may cause serious embarassment to litigants, and in many

instances deprive them of their rights. A defendant may set up in answer to a claim a discharge in bankruptcy, a general release, a prior adjudication, or other matters which generally present only a question of law. If the referee, in his short form of decision, ignores these defences because he holds them insufficient, there will be no possibility of review of the questions in this court; for, if such a decision presents a question of fact and not of law at the appellate division, it is equally so in this court, and this court has no jurisdiction to review questions of fact.

I do not think the dicta quoted from the long list of authorities cited by the appellant's counsel that this court is limited on appeal to an examination whether there is any evidence to support the findings of fact, and whether those findings justify the conclusions of law, should control our decision. There are at least five recent decisions of this court in which statements are to be found in the opinions, which, taken without reference to the cases then before the court, would seem to deny our power to examine the question whether there is any evidence to support the findings of fact. Bomeisler v. Forster, 154 N. Y. 237, 48 N. E. 534, 39 L. R. A. 240; Snyder v. Seamen, 157 N. Y. 449, 52 N. E. 658; Petrie v. Trustees, etc., 158 N. Y. 463, 53 N. E. 216; Farleigh v. Cadman, 159, N. Y. 175, 53 N. E. 808; Smith v. Improvement Co., 161 N. Y. 489, 55 N. E. 1100. Yet there is no question but that this court has such power, except in case of a unanimous affirmance below. We have recently protested against the practice of excerpting expressions from judicial opinions, and reading them without reference to the cases in which they were

rendered, and have shown the errors to which such a practice may lead. Fealey v. Bull, 163 N. Y.—, 57 N. E. 631. The statements in the various cases cited by the counsel for the appellant, as well as those cited in this opinion, were entirely justified, because they were made with reference to the questions raised by the records in the particular cases then before the court. If it be not permissible for a judge to make such an assertion without at the same time stating all the possible limitations and exceptions to the rule declared, the prolixity of judicial opinions oftentimes necessarily great, will become intolerable. Stability and uniformity in the administration of the law is to be obtained by adhering to the propositions actually decided or necessarily involved in the decision, not to dicta in opinions. I can find no case in which the question presented on this appeal has been decided. I think the order of the appellate division should be affirmed, and judgment absolute rendered for the defendant on the stipulation.

BARTLETT, J. (dissenting). I agree with the general reasoning in Judge CULLEN'S opinion, but rest my vote in this case solely upon the fact that the judgment entered herein on the report of the referee is contrary to the undisputed documentary evidence. The situation here presented is made clear by a simple illustration: A. sues B. upon his promissory note. The case is sent to a referee to try the issues, who find the execution of the note, the amount alleged to be due thereon, and orders judgment therefor. On appeal the appellate division reverses on the law alone. On further appeal to this court the record discloses that the defendant

pleaded and proved a discharge in bankruptcy and a general release, both of which were in law a satisfaction of the note; that the referee handed down the short form of decision, in which no reference was made to the documentary proof referred to, and the defendant filed an exception to the decision. It thus appears that by pleading, proof, and exception the defendant has availed himself of, every remedy afforded by the Code of Civil Procedure. If it be true that this condition of the record does not present a pure question of law, then it follows that the defendant is remediless, and the Code of Civil Procedure cannot be too speedily amended.

GRAY, MARTIN, VANN, and WERNER, JJ., concur with Parker, C. J. CULLEN and BARTLETT, JJ., read dissenting memoranda.

Judgment reversed, etc.

No. 215.

HENRY J. COOKINHAM,
UTICA, N. Y.

Supreme Court of the United States.

Brf. of Cookinham & Wood

Supreme Court, U. S.
FILED
MAR 13 1902
JAMES H. McKENNEY,
Clerk.

No. 215.—October Term, 1901.

Filed March 13, 1902.

E. Bement & Sons,
Plaintiff in Error,
vs.
The National Harrow Company,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD CAHILL & CLARK C. WOOD,
Solicitors for Plaintiff in Error.

H. J. COOKINHAM,
Of Counsel.

UTICA, N. Y.:
THOMAS J. GRIFFITHS, LAW PRINTING.
1902.

Supreme Court of the United States.

No. 215.—October Term, 1901.

E. Bement & Sons,
Plaintiff in Error,

vs.

The National Harrow Company,
Defendant in Error.

This is a writ of error to the Supreme Court of the State of New York to review a decision of the Court of Appeals of that state, reversing a judgment entered in the Oneida County Clerk's office June 22, 1900, upon a decision of the Appellate Division of the Supreme Court, which judgment reversed a judgment entered upon the report of the referee in favor of the National Harrow Company awarding that company $20,985.00 damages and $1,525.23 costs, decreeing specific performance of the contracts sued upon and awarding to defendant in error an injunction restraining the plaintiff in error, E. Bement & Sons from violating the same.

The subject of the suit is spring tooth harrows.

The questions are as to the contracts being in restraint of trade, forming an illegal combination, and that they are in violation of the Act of Congress protecting inter-state commerce.

This action was brought in October, 1894, upon two contracts, both of which are set out in full as exhibits to the complaint. These two contracts are identical in form, except that they apply to different harrows and to somewhat different territory.

On page 2 of the brief of the counsel for the defendant in error on his motion to dismiss the appeal he states: "That the exceptions which raised questions of law in the case were by the act of the parties stipulated out of the case after the judgment had been entered on the decision of the referee." This is an error, as no stipulation upon that subject was made by the parties except the one found on pages 389-390 of the record, and that does not eliminate any law questions from the case except those which arose upon the reception or rejection of evidence.

The stipulation expressly states what the questions are to be considered, among which is the only one to be discussed in this court, viz.: That the contracts are in violation of the Act of Congress of July 2, 1890, in regard to inter-state commerce.

This act was pleaded in the answer as a defense to the action. The defendant in error is the successor,by assignment, of the National Harrow Company of New York to whatever rights it has in the contracts in suit. These contracts, although dated April 1, 1891, were not in fact made until June 16th or 17th of that year.

I SHALL DISCUSS THE QUESTION RAISED BY THREE ASSIGNMENTS OF ERROR, WHICH ARE AS FOLLOWS:

11½.

"The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts Exhibits A and B attached to the bill of complaint where in conflict with the Act of Congress, approved July 2d, 1890, and was not an error of law.

12.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves, they are not in violation of the Act of Congress known as Chapter 647 of the Laws of 1890, and in not holding that the contracts are in violation of said act.

13.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves, the conceded facts, and facts conclusively proved, the contracts are not in violation of the Act of Congress known as Chapter 647 of the Laws of 1890, and in not holding that the contracts are in violation of said act."

AS TO THE FACTS BEFORE THIS COURT.

The first thing to be determined by this court is just what is before it in view of the peculiar practice in the state of New York. It is not my object to argue that this court will not be controlled by the construction given by the Court

of Appeals of the State of New York to any statute of that state, but it is my purpose to show here that the New York Court entirely misconstrued the referee's report and overlooked the fact that by his findings all of the material contracts between the parties and the material facts in the case were properly before that court, and that, this being the case, the contracts are clearly in violation of the act of Congress protecting inter-state commerce.

I here quote the portion of the referee's report which bears upon this question: Record, p 63:

"This corporation (The National Harrow Company of New York) entered into some contracts with spring tooth harrow manufacturers which were decided by the Supreme Court of the state of New York to be illegal, as against public policy on account of restraints contained in the contracts which extended beyond the life time of the patents. That case is reported in the New York Supplement, vol. 18, page 224, Strait et al. vs. National Harrow Company et al. Immediately following this decision all of the contracts then in existence which were effected thereby were immediately canceled by the parties to such contracts. * * * The defendant had no contract with the National Harrow Company until about June 16th or 17th, 1891,at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several U. S. letters patent and license

rights and privileges under U. S. letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and the privileges thereby transferred, and the defendant agreed to accept in payment therefor the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by an arbitration under which arbitration the defendant was awarded and the value was fixed at upwards of $29,000. * * * The transactions between the National Harrow Company of New York and this defendant had in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the U. S. letters patent and licenses under U. S. letters patent, relating to float spring tooth harrow business conducted by the defendant, was founded on a good, valuable and adequate consideration moving between the parties. That as part of such transaction the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts "A" and "B" which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above and the defendant and its customers were settled. The papers which were exe-

cuted in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. * *

I decide that the contract entered into in June, 1891, including the contracts "A" and "B" between the National Harrow Company of New York and this defendant, were and are good and valid contracts founded on adeqate considerations and were reasonable in their provisions; contracts "A" and "B" imposing no restraints upon the defendant beyond those which the parties had a right from the nature of the transaction to impose and accept. * * *

I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in court, having jurisdiction, and that all the contracts in evidence were and are legal, valid, and binding contracts such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade or tending to create a monopoly, trust or any other illegal combination, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts "A" and "B," are and were intended to be continuing contracts and should be enforced according to their true intent and meaning as hereby interpreted.

I decide that the plaintiff is entitled to judgment in this action against the defendant as follows:

1st. Declaring the validity of the plaintiff corporation and its title to contracts "A" and "B."

2d. Decreeing that the contracts, including contracts "A" and "B," are good and valid contracts in law." * * *

On examining the opinions of the Court of Appeals it will appear that the New York court treated the case as though no part of the contract was before it except the portion contained in Exhibits "A" and "B" attached to the complaint. This is clear from the fact that Judge Cullen, who wrote one of the dissenting opinions, states that the "referee rendered judgment for the plaintiff, making the short form of decision authorized by section 1022 of the Code of Civil Procedure, in which he ignored the agreement set forth in the answer." (Page 14, Appendix to brief of my associates.) This is so manifest an error on the part of the Court of Appeals as to be incredible. If that court had examined the record with care, it would not have failed to discover that the referee had treated the making of all the agreements as one transaction and in express terms passed upon them all and held them all to be valid. He found (R., p. 63) that "The defendant had no contract with the National Harrow Company until June 16th or 17th, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several U. S. letters patent, etc. * * *

and agreed to accept in payment therefor paid-up capital stock of the National Harrow Company of New York, and the value was to be fixed by arbitration.

He then (R., p. 64) referred to the "transaction" in June, 1891, as transferring absolute title of the patents to the National Harrow Company, and says: "That as part of such transaction the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts "A" and "B" which are attached to the complaint. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six named above and the defendant and its customers was settled. The papers which were executed in June 1891, were all dated as of April 1st, 1891, and were to take effect as of that date." He then concluded as follows: "I decide that the contract entered into in June, 1891, including the contracts "A" and "B" between the National Harrow Company of New York and this defendant were and are good and valid contracts founded on adequate considerations and were reasonable in their provisions contracts "A" and "B" imposing no restraints upon the defendant above those which the parties had a right from the nature of the transaction to impose and accept. * * * *

He then decides that "all the contracts in evidence were and are legal, vaild and binding contracts such as might reasonably be

made under the circumstances, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts "A" and "B," are and were intended to be continuing contracts and should be enforced according to their true intent and meaning as hereby interpreted."

It is apparent that the referee found and intended to find that the entire transaction between the parties which resulted in the making of all these several agreements, was a legal transaction, that the contract as a whole was valid and not in violation of the act of Congress.

He expressly states that they embody "no illegal restraint and are not repugnant to any rule of public policy or in restraint of trade or tending to create a monopoly, trust or other illegal combination." He also finds that all the contracts put in evidence are legal and binding contracts.

The defendant in error put in evidence all of the important contracts. Exhibits 1 and 2 in evidence are respectively Exhibits "A" and "B" attached to the complaint. Exhibits 3 and 4 in evidence are respectively Exhibits 6 and 5 of the amended answer. Exhibit 5 in evidence is an agreement between the parties by which plaintiff in error promised to pay one dollar on each harrow from September 10, 1890. The defendant in error put in evidence all these five contracts, and the referee found them to be legal and binding contracts.

R., pp 7; 19, 20; 8, 63, 68, 72.

THE NEXT INQUIRY IS AS TO THE POWERS OF THE COURT OF APPEALS IN THE CASE AS IT WAS PRESENTED TO THAT COURT.

The jurisdiction of that court is conferred by Section 9, Article 6, of the Constitution, as amended in 1894, which reads as follows:

"After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion ought to be reviewed by the Court of Appeals.

The Legislature may further restrict the jurisdiction of the Court of Appeals and the right of appeal thereto, but the right of appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of December, one thousand eight hundred and ninety-five, but appeals therefrom may be taken under existing provisions of law."

It certainly was not the intent of the convention to place the Court of Appeals in such a position as it could not consider conceded facts or facts conclusively proved. I speak this from knowledge, having, as a member of the judiciary committee of that convention, assisted in framing this section. Subsequent to the adoption of this provision, the Code of Civil Procedure, that accumulated legislative folly of the ages, was amended in regard to appeals to the Court of Appeals and the section in question now reads as follows:

"Section 1338. Upon an appeal to the Court of Appeals from a judgment, reversing a judgment entered upon the report of a referee or a determination in the trial court; or from an order granting a new trial, upon such reversal; it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from."

A condition of affairs was brought about in this case that perhaps never existed before in any litigation. The plaintiff in error was defeated in the Court of Appeals, solely because of a differ-

ence between that court and the Supreme Court in regard to a question of practice.

The referee made what is known under the New York Code as the short form of a report, provided for by Section 1022 of the Code of Civil Procedure, in which he did not find fully upon the facts, but simply stated concisely his reasons for deciding in favor of the defendant in error. An appeal was taken to the Appellate Division of the Supreme Court, which has full power to hear the case de novo. This court had the right to confirm, reverse or modify the judgment in any particular that justice required. It reversed the judgment upon questions of law holding that, upon the facts found by the referee and the conceded facts and facts conclusively proved,the contracts were in restraint of trade and void. The case was then appealed by the defendant in error to the Court of Appeals, and it came on for hearing. At this time there were but two judges alive who heard the case in the Appellate Division. The counsel for the plaintiff in error here communicated with the two judges and asked whether or not they had understood that they reversed the judgment entered upon the referee's report upon questions of fact as well as upon questions of law. Both of the then living judges replied that they did not reverse upon questions of fact but only on questions of law. The plaintiff in error was at that time in this position: The Appellate Division held that it had the right to consider conceded facts and facts conclusively proved in connection with the contracts, in determining as

a question of law whether or not the contracts were void. The Court of Appeals held that it could not consider conceded facts or facts conclusively proved; that it must be confined solely to the facts found by the referee and such as would tend to support his finding. The plaintiff in error was therefore beaten by the Court of Appeals, not because it was wrong, but because five judges in that court differed with four judges of the Appellate Division as to the practice. The five judges of the former held that conceded facts and facts conclusively proved could not be considered, whereas the four judges in the Appellate Division, as one took no part in the decision, held that the consideration of conceded facts or facts conclusively proved was a question of law and not one of fact. One of the judges of the Court of Appeals has well said recently, "This case gave us a great deal of trouble at the time and is still giving us trouble."

I believe this is the first time in the history of jurisprudence where a court has declined to take into consideration in deciding a case material conceded facts and those conclusively established.

Whatever conclusion this court may come to as to its right to consider all the facts in the case, I submit it should consider enough to conclude that contracts "A" and "B," being but part of an entire contract found by the referee, are in violation of the federal statute against trusts and monopolies.

It has been shown above that the referee found sufficient facts to enable the court to take into consideration all the material questions in dispute concerning the validity of the contracts.

The New York court had before it, by the express finding of the referee, all the contracts put in evidence and the facts which warranted the referee in finding they were made as proved in the case. It is contended by the plaintiff in error that this is sufficient to show a transaction formulated into a contract which was in violation of the federal statute.

It will not, I presume, be contended that a contract in separate parts is in effect any different from one containing the same provisions in one paper. Treating the several agreements as one contract, I will therefore now state its substance.

I first refer to the escrow agreement known as Exhibit 4 in evidence, 5 of the amended answer. This is that part of the contract upon which the whole scheme of effecting a combination is founded. It provides that "whereas the National Harrow Company is the owner of a large number of patents relating to float spring tooth harrows and is desirous of granting licenses thereunder to the following persons, firms and corporations, to wit: Chas. H Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, The Herndeen Manufacturing Com-

pany, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everest & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

And whereas, the National Harrow Company has placed in the hands of E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms and corporations.

Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris, whereupon they shall become operative and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same; in person or by mail.

But in case any of the above named persons, firms and corporations shall neglect or refuse to sign, execute and deliver said respective contracts and licenses, on or before the first day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a reso-

lution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case of the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void."

It will be noted that a part of the arrangement is that the license and the contracts were to be left in escrow in the hands of Mr. Norris only to be effective when all the parties named had signed the papers and left them with Mr Norris or until the trustees of the National Harrow Company should direct the papers to be de livered.

The second of the papers is what is known as the arbitration agreement and is the paper known as Exhibit No. 3 in evidence, No. 6 of the amended answer. This part of the contract provides for the arbitration to fix the amount of the capital stock of the National Harrow Company of New York to be paid to the different parties to the agreement for the patents and rights which they were to turn over to the National Harrow Company by the terms of the agreement. This paper also ratifies and confirms the assignment of patents, etc., to the National Harrow Company which had been assigned to it under the

papers which had been declared invalid by the Supreme Court of the State of New York, and it also provides that such rights as had been transferred by the party of the second part to the National Harrow Company by the first set of papers, were transferred back to the party of the second part.

The other part of the contract is that portion contained in Exhibits "A" and "B" attached to the complaint, which is the same form as Exhibit 7 attached to the amended answer. This portion of the contract is called the license and is the paper sued upon. It mentions the patents owned by the National Harrow Company which were those transferred to it by the parties named in the escrow agreement. It also fixes the terms upon which harrows are to be sold and paid for and the territory where harrows are to be sold at the particular price fixed by the contract..

The fifth exhibit is the agreement by plaintiff in error to pay royalty from September 10, 1890, that being the date of the first set of papers agreed to by E. Bement & Son. All of which papers had been declared void by the Court in the Strait case.

Taking all these papers together as one contract, an agreement is made between the National Harrow Company of New York and the plaintiff in error to execute certain papers and to leave them in the hands of Mr. Norrs in escrow, none of them to be operative until eighteen other concerns engaged in the manufacturing of spring

tooth harrows shall join these two parties in the same agreements or until the National Harrow Company shall resolve by its board of trustees to allow the papers to be delivered, although less than the whole number have executed them.

It is clear therefore that all the written contracts made by the parties were properly before the New York court and that the effect of the decision of that court was to determine that all the agreements treated as one entire contract was not in restraint of trade nor against public policy, nor inimical to the act of Congress protecting inter-state commerce.

My contention is that as the case is presented here it is precisely the same as though the courts of New York had held in express terms that the contract consisting of all the papers executed by the parties in June, 1891, did not fall under the prohibition of the act of Congress. The act having been pleaded as a defense in the suit, no decision could be rendered against the plaintiff in error unless the court held that the contracts were not in violation of the federal statute.

AS TO THE CONTRACTS BEING IN VIOLATION OF THE ACT OF CONGRESS KNOWN AS CHAPTER 647 OF THE LAWS OF 1890.

The statute reads as follows:

Section 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared

to be illegal. Every person who shall make any such contract or shall engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine, not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

This is a general statute and applies to all classes of contracts, combinations, trusts or conspiracies whereby there is an agreement which, in any way, is in restraint of trade or commerce among the several states.

The eighth section of the act provides that the word "person or persons" shall be deemed to include corporations.

The question is whether or not the contract is prohibited by this statute. In arriving at a conclusion it is necessary to examine somewhat in detail the provisions of the papers. The escrow agreement, Exhibit 4 in evidence, No. 5 of the amended answer, is that portion of the contract

upon which the whole transaction is founded. This paper provides for the placing of all the separate parts of the contract in the hands of Mr. Norris to be held in escrow until the happening of one of two contingencies. First, that all the parties named in the paper should execute them, or,

Second, that the National Harrow Company should order the papers delivered, although less than the whole number had executed them. The paper providing for the arbitration plays no prominent part in this branch of the case, but the escrow agreement and the part of the contract known as Exhibits "A" and "B" attached to the complaint are the important ones to establish our contention that the contract has reference to inter-state commerce and that it is in restraint of trade and is an attempt to monopolize and conrol inter-state commerce upon an important article of merchandise. All the contracts are the same in form, although they refer to different harrows and to somewhat different territory. It is a provision of the agreement that no two harrows shall be alike, that is, that no licensee shall make a harrow similar to the harrow made by another licensee. In Schedlue "A" attached to Exhibit "A" of the complaint, the harrows which the plaintiff in error was, licensed to manufacture and sell are described as follows:

1. A float spring tooth harrow, channel or II beam, steel frame (Steel King), marked E.

Bement & Sons, Lansing, Mich. Dated December 16, 1890. No. 14.

2. A float spring tooth harrow, wood frame, lined without teeth, marked E. Bement & Sons, Lansing, Mich. Dated December 16, 1890. No. 15.

Schedule "B" provides a list price for harrows and their parts and also for the terms of sale and the territory wherein they are to be sold at the price fixed in the schedule. The price is arbitrarily fixed with reference to state lines as follows: "A maximum discount of forty-two (42) per cent may be allowed on sales of harrows, harrow frames and teeth in the following territory: All of the New England states; also states of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia. A maximum discount of forty-five (45) per cent may be allowed on all sales made in the territory throughout the United States not mentioned above."

It is difficult to see how a contract could be drawn which would more clearly appear to have reference to inter-state commerce than the one before the court.

The plaintiff in error is a manufacturer of harrows located at Lansing, Michigan. The defendant in error was a corporation organized under the laws of the State of New York, and the contract between these two corporations had reference to the manufacturing of an article of merchandise at Lansing, Michigan, and selling it in all the states of the Union, and fixing the price

arbitrarily at a discount in some of the states of forty-two per cent upon list prices and in other of the states of forty-five per cent discount upon the same list prices.

In order to succeed in the case it was necessary for defendant to show that plaintiff in error had sold harrows; this was done, and it appeared that sales of harrows manufactured in Michigan had been made in many of the other states of the Union.

R., pp 8, 248.

It was first contended that, under this act of Congress, only such contracts were prohibited as were void at common law, but the court held otherwise and said broadly that any contract in restraint of trade was void, provided it had reference to inter-state commerce.

United States vs. Joint Traffic Association, 171 U. S., 505.

United States vs. Trans-Missouri Freight Association, 166 U. S., 290.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211.

It will not be claimed that the contracts are not in restraint of trade. The only question which could possibly be raised in that respect is whether or not the restraint is reasonable. Under the federal statute this is immaterial. If there is any restraint and the contract has reference to inter-state commerce, it falls under the prohibition of the statute.

It will be observed that this is not the ordinary case where the owner of patents grants licenses to parties to use patents. In this case the grantor of the right receives the patents by the very transaction which results in its granting the privileges under the patents. That is, it had no right to grant a license to E. Bement & Sons until E. Bement & Sons had transferred to the National Harrow Company the patents which it owned and under which theretofore it manufactured its harrows. It will be clearly seen that the sole object of the parties in transferring their patents to the National Harrow Company, which was simply a tool, was to place in the hands of that company a large number of patents so as to effectively control the trade in this article, drive out other manufacturers, and monopolize the harrow business.

To say that the National Harrow Company had the right to make the contracts "A" and "B" because it owned the patents is to beg the question, for it received the patents through the very transaction that is in issue, and not only one part of the contract is void, but it is entirely void, and the National Harrow Company never owned the patents, the title is still in the parties which assigned the patents as a part of the combination.

I do not controvert the proposition that a patent is, from the very nature of the case, a monopoly, but it is a monopoly of the thing covered by the patent. To this extent the government grants to the patentee a monopoly for the

purpose of encouraging invention. When such patent is granted it becomes the property of the patentee; he has the right to use it or not, to permit others to use it and to attach conditions to the use of it as he may choose. This is, however, the extent of his power under the patented right. He can no more enter into a combination with others holding other patents than can the owner of any other property enter into a combination with the owners of a like property to control a line of trade. No more favorable rule applies to this class of property in this respect than to any other. If owners of patents combine to control or monopolize inter-state commerce, such combination or contract is as inimial to the federal statute as though the combination were made in regard to any other property. In fact, it would seem that a stricter rule should be applied in regard to combinations of patents than to any other class of property, as it is only by favor from the general government that the inventor has a property right in his discovery which he can protect. How, then, should he be heard to say that his right is superior to the right of another over his own acquired tangible property?

Judge Acheson very wisely says in the case of the National Harrow Company against Hench & Dromgold, 76 Federal Reporter, 667: "To the present case may well be applied the remarks of the Supreme Court of Pennsylvania in Morris Run Coal Company vs. Barclay Coal Company. "This combination is a power in its confederated

form which no individual action can confer." This is preisely the situation in the case at bar. The owners of these patents in their confederated form, viz., the National Harrow Company of New York, had a power, if these contracts are valid, greater than they had individually.

See also Heaton Peninsular Button Fastener Company vs. Eureka Specialty Company, 47 C. C. A., 166.

National Harrow Company vs. Hench, 83 Fed. R., 36.

The case of the National Harrow against Hench 84 Fed. R. 226 was a patent suit; the defendant pleaded the illegality of the same transaction, as is in issue here, and the court held it a defense.

The contracts sued upon have been repeatedly held to be in restraint of trade according to the common law If such is the case, how is it possible that they should not be in restraint of trade and tend to form a monopoly in regard to inter-state commerce, provided they are applicable to that subject?

National Harrow Company vs. Hench, et al. 76 Fed. R. 667.

National Harrow Company vs. Hench, et al, 85 Fed. R. 271.

National Harrow Company vs. Quack, 67 Fed, R. 130.

National Harrow Company vs. E. Bement & Sons, 21 Appell. Div. Supreme Court of N. Y. 290.

The referee by inference held the contracts to be in restraint of trade, but decided the restraint not to be unreasonable. He at that time, in 1895, undoubtedly thought that the restraint under the federal statute must be such as rendered a contract void at common law. This was error as the court has since decided.

R. p. 67.

The restraint of trade and the attempt to monopolize the entire business between the states in this particular implement is more effectively shown by the provisions of the contract other than those which refer solely to the price of harrows and the territory in which they are to be sold

In the second sub-division of the contract the so-called licensee is prohibited from selling any goods upon commission or making any rebate or reduction from the price fixed by the licensee except to settle with an insolvent debtor. This clearly prevents the licensee from giving to a customer any reduction of price by reason of increased facilities for producing the goods, or reduction in the price of material, better shipping facilities, or on account of any change of condition. It is apparent that this provision is for the purpose of controlling the sale of the implements.

Consumers in other states than that in which the article is manufactured should be entitled to reap the benefit of healthful competition in trade.

By the third sub-division of the license the licenese is prohibited from selling harrows with

or without teeth manufactured by another licensee at a less price or on more favorable terms of payment and delivery than those fixed by the licenses. This prevents healthful competition in case some other manufacturer should be able to manufacture the goods for less than the licensee himself. There is no patent upon a spring tooth nor upon many of the parts of the frame, nor upon many of the attachments thereto, yet the licensee is prohibited from selling a tooth or any part of the frame except at combination prices, although he might be able to produce it for one-fourth of the price fixed in the license. This provision therefore is not to protect the rights of the defendant in error under any patent, but to effect more perfectly a monopoly of the business. The producer of a haarrow cannot say what the selling price of his goods is to be in future under this contract. He may, by increased facilities, be able to produce his harrows for one-half the selling price fixed in the contracts, yet he cannot reduce the price unless consent is given by the National Harrow Company. The very fundamental principal of trade is violated here. The selling price should bear some relation to the cost of production; in this case it bears none. The price is fixed arbitrarily by the contracts entered into by the parties who combined to control commerce by this contract, and that commerce is between the states, for the price is fixed with reference to state lines. The plaintiff in error under the contracts can sell a harrow in California at a less price than in New York or Pennsylvania. Not

because it cost more to place them in these states but because the combining parties agreed to this provision and placed it in the contracts.

By the sixth subdivision of the license, the licensee is, forever, prohibited from being "directly or indirectly engaged in the manufacture or "sale of float spring tooth harrows or float spring "tooth harrow frames, without teeth or attachments applicable thereto, other than those "which it is licensed to manufacture and market "under the terms of the license, except such as it "may manufacture and furnish another licensee "of the National Harrow Company, and then only "such constructions thereof as such other licensee shall be licensed by the National Harrow "Company to manufacture and sell, except such "other style and construction as it may be licensed to manufacture and sell by the National "Harrow Company."

This provision is intended to prohibit the licensee making any improvement, of any kind, upon the harrow which is licensed to make, or inventing or manufacturing any other style of float spring tooth harrow than that covered by the license. What could more effectively stifle competition and invention than such a provision? The very object of a patented right would be defeated by this provision, if it should be held to be valid. The incentive to invention would be stifled, yet the object of a patent is to stimulate invention, and not stifle it. This is clearly expressed in the federal constitution in conferring

power upon Congress, Article 1, Section 8, Paragraph 8, which is as follows:

"To promote the progress of science and use-
"ful arts by securing for limited times to authors
"and inventors the exclusive right to their re-
"spective writings and discoveries."

The implication is clear in this provision that monopolies are inimical to public good for the "exclusive right" is to continue only for a "limited time."

If, then, the acts of Congress providing for patents in pursuance of the above provision are for the purpose of promoting progress in science and the useful arts as they certainly are, it would follow, that the spirit of the constitution and the statute is violated by this contract.

In this case we have an express provision of the license granted by a combination having control of, substantially all the manufacturers in the United States that the licensees shall never, except by permission of the licensor, make another float spring tooth harrow except it be a duplicate of the one deposited with the treasurer of the National Harrow Co. The principle of law referred to by Judge Smith is as applicable here as to the facts in the Clipper Chilled Plow Co. case, that is that "the mischief of a monopoly is not neces-
"sarily in the fact that the prices are raised, but
"that they have the power to control and raise
"the prices." To paraphrase this sentence we say: "The mischief of this monopoly is not neces-
"sarily in the fact that it will prevent invention,

"but that it has the power to control and pre-
"vent."

Strait vs. National Harrow Co., 18 N. Y., Sup. 224 and cases cited.

National Harrow Co. vs. Quick, 67 Fed. Rep., 130.

The effectiveness of the combination is clearly shown in the seventh clause of the license. It is there provided that, for every harrow sold by the licensee, "contrary to the strict terms and provi-
"sions of this license, he shall pay the sum of five
"dollars liquidated damages." This provision is intended as a deterent to the lincensee, so rigorous, that he dare not take the risk of giving to the trade more favorable terms of purchasing harrows than those stated in the license. None but a courageous man, backed with ample capital, would dare undertake a controversy over the validity of these contracts for the reason that, the consequences of defeat would be disastrous, if he should be compelled to pay five dollars damages for every harrow sold. The scope of this section does not appear without a careful examination. The penalty here provided for selling a completed harrow, in violation of the terms of the license, is five dollars. But the same penalty is provided for selling a frame or an attachment thereto. For instance, one tooth, bolt, or a clip, upon which there is no patent. Still further, to illustrate the extraordinary nature of this subdivision, let us suppose that a manufacturer of wheel harrows desired to purchase

spring teeth of a licensee. There never was but one patent upon spring teeth and that expired long prior to the formation of the National Harrow Company of New York. These teeth are purchased by the tens of thousands. The licensee in such a case as this, though he could make the spring teeth for ten or twelve cents a piece, could not sell those teeth, except at the price mentioned in the license contract, seventy-five cents each, less forty-five per cent. discount, leaving the selling price 41 25-100 cents, without incurring liability to pay five dollars penalty for each tooth. What is true in regard to a spring tooth, is also true in regard to any part of the frame or any attachment thereto, although it might be a bolt, that did not cost to exceed one cent.

The eighth sub-division is an attempt of the combination to put the licensees in a position where they cannot contest the patents.

This sub-division contains an express provision that the licensee "will not alter or change the "construction of the float spring tooth harrows, "float spring tooth harrow frames without teeth, "and attachments applicable thereto, which it is "authorized to manufacture and sell under this "liense in any part or portion thereof which em-"bodied any of said inventions covered by such "letters patent, or any of them, or any re-issue "thereof."

It will be observed here that a licensee is estopped, if this provision be valid, from changing his

harrow or improving it, although it would be impossible for him to tell whether such improved harrow would be in infringement upon any re-issue of a patent to the plaintiff that might be granted subsequent to such improvement of the harrow.

To illustrate this point, suppose the defendant should improve the Steel King Harrow, making it a very much better harrow, such improvement would not be covered at the time by any patent mentioned in the license, but if plaintiff should thereafter ask for a re-issue of one of its patents and such re-issue should be made with further claims and plaintiff should contend that it covered the new harrow of defendant, the defendant would be prevented from ever manufacturing the harrow, or even contesting the validity of the re-issue patent, whether or not it covered the harrow. The fact that a re-issue was granted would prevent a contest on those questions.

The tenth sub-division is very broad. It is an absolute prohibition against the licensee "manu-"facturing, vending or procuring to be manufac-"tured or used, directly or indirectly, any other "or different style of float spring tooth harrow, "float spring tooth harrow frame without teeth, "or attahments applicable thereto, than dupli-"cates of such as are deposited by it with and in "possession of the treasurer of the National Har-"row Company and embraced in this license, or "any part thereof, embraced in or forming a part

"of such invention described in the patents here-
"inbefore mentioned or the reissue of such pa-
"tents, except such portions thereof as it may
"supply to another licensee of the National Har-
"row Company which such other licensee shall
"be licensed to manufacture and sell."

This provision not only prevents the licensee making a complete harrow different from that licensed for itself or for another licensee, but it prohibits the licensee from making any part of any harrow manufactured by any other than a licensee. For instance: No licensee can manufacture a tooth or a bolt, or a piece of malleable iron that goes into the construction of any harrow not licensed without violating this provision, although these separate parts are not patented.

The eleventh sub-division places the licensee in absolute subservience to the will of the National Harrow Company. The well settled rule is that a failure to pay a royalty, or any other breach of a royalty contract does not authorize the licensor to treat the licensee as an infringer. Yet, in this instance, the combination does not allow licensees to make a harrow unless they agree to this extraordinary provision.

2 Robinson on Patents, Sec. 821.

The fifteenth sub-division provides that the licensee shall not have the right to assign the license without the written consent of the licensor. It also provides that it shall not be assignable by operation of law. For instance, in case of the in-

solvency of one of the licensees, the receiver or assignee would take no rights under the license without the consent of the licensor. This clearly shows that the intent of the combination is to forever place the power in the National Harrow Company to do as it pleases in regard to the spring tooth harrow business of the United States, and that the ordinary rules of equity in insolvent cases shall not prevail in this instance.

Sub-division seventeen is as follows: "The "place of performance of the agreement shall be "the City of Utica, N. Y., and this agreement "shall be construed and the rights of the parties "thereunder determined according to the laws of "the State of New York." We do not controvert the proposition that, assuming the contracts to be valid, they shall be construed according to the laws of New York, but we contend that the laws of the State of New York applicable to the indisputable facts, in this case, show the contracts to be void, and therefore there are no contracts to construe.

But further the parties cannot take the contracts out from under the federal statute by agreeing to do so. This would be to nullify the statute.

All these provisions limiting the rights of the licensee are for the sole purpose of restricting the trade in harrows. It could make no difference how many harrows a manufacturer produced if he never sold them. If the statute is not far reaching enough to prohibit a combination to

prevent manufacturing of harrows the court will consider all their limitations as bearing upon the questions of restricting trade and commerce in such articles and as tending to a monopoly. All the restrictions with respect to manufacturing are totally ineffective except they be connected with the provisions in regard to sale, price and the territory where harrows are to be sold.

The Federal Courts have repeatedly passed upon this statute and the decisions, it seems to me, show clearly that the contracts before the Court in this case are in violation thereof.

McMullen v. Hoffman, 174 U. S. 639.

Central Transportation Company v. Pullman Car Company, 139 U. S. 24.

United States v. Trans-Missouri Freight Association, 166 U. S. 290.

United States v. Coal Dealers Association, 85 Fed. R. 252.

United States v. Hopkins, 82 Fed. R. 529.

United States v. Joint Stock Association, 171 U. S. 505.

Addyston Pipe and Steel Company v. United States, 175 U. S. 211.

The last case above cited seems to be very much in point here. In that case there were but six combining parties and the price of iron pipe was not fixed with reference to state lines, but with reference to specific territory. In this case there were nineteen combining parties. The object was to control the price of spring tooth harrows, and it was regulated with reference to state lines. In

the Addyston case an auditor was appointed to receive reports from the separate institutions in order to know whether they were complying with the agreement. In this case reports were to be made to the secretary of the National Harrow Company for the same purpose. It would seem that upon principal, the two cases are so near alike that good logic requires the court to hold these contracts illegal. The very principal upon which the federal statute rests is to keep trade and commerce free between the states. These contracts are for the sole purpose of restricting them. Prior to the making of them the plaintiff in error had free access to the markets of every state, but the contracts exclude it from the markets of the entire country unless it complies with the restrictions imposed upon it by the combination agreements.

It is not at all necessary that the monopoly should have been complete. The statute prohibits any contract which is in restraint of trade or commerce or which tends to monopolize trade and commerce or any part of it between the states. It would be fruitless to enter into a discussion as to the meaning of the word monopoly. In this day the air is virtually surcharged with it, and every intelligent person knows well its meaning. If any contract or combination has a tendency to prevent competition, control prices, limit production or curtail territory in interstate trade or commerce, it is an attempt at monopoly, and is prohibited by the statute.

The contention of the counsel for defendant in error that there may be a combination of patents has no application to this case. What matters it if a state court holds that the owners of patents may, at common law, combine to control an article covered by the patents? Such a decision would have no relevancy to this case for the federal statute is so broad that it includes "every contract combination in the form of a trust or otherwise," and declares them illegal. It would be impossible to draft a statute broader in this respect than the one under consideration. It is as complete a prohibition upon a combination of patents to control interstate commerce as to restrain trade in iron pipe or any other commodity. At common law contracts may be valid or invalid according as the court shall declare public policy concerning them, but in the Trans-Missouri Freight Association case, 166 U. S. 291-301 this court said: "If the law prohibits any contract or combination in restraint of trade or commerce a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject."

May not this Court look into the whole record to see if a party's rights under the Federal laws have been denied; and, if so, may not the Court consider any fact in the record necessary to enable it to grant relief?

In the case of Gregory v. McVeigh, 23 Wallace, 294, it was held that where a federal question

was involved in a suit in an inferior court, and no appeal could be taken to the highest court of the State, except by leave of such court or a judge thereof, and leave could not be obtained, a writ of error would lie to such inferior court to review its judgment in this court.

I understand from this case that where a federal question is involved no act of a state court will prevent the party coming into this court for redress. Applying this rule to the case at bar I ask, how can any decision of the Court of Appeals of New York prevent this court looking into the record to see whether or not rights have been denied to the plaintiff in error which are guaranteed to it by the constitution and statutes of the United States? The Court of Appeals has decided in effect that there is no appeal to that court from the judgment entered on the decision of the Appellate Division of the Supreme Court, except as to certain questions. Can this court be confined in its investigations of a case to such questions as the Court of Appeals decides it may consider? I think not. What if that court had decided that there was no appeal to it from the judgment entered on the decision of the Appellate Division? Would this court be prevented by such a holding from examining the whole record to ascertain whether or not a federal question was involved? In other words, can any state court by finding facts or failing to find them, prevent this court examining an entire record to see if the rights of a party under the federal laws have been denied? This court is not restricted

in its examination of a case by the constitution or Code of Civil Procedure of the State of New York, even if the Court of Appeals of that state is so restricted. In this case the Supreme Court of the State of New York has rendered judgment against the plaintiff in error. Its authority for so doing is the decision of the Court of Appeals, which court has authorized the rendition of such judgment upon the ground that it could not examine into the facts within the record. This court has sent its writ of error to the Supreme Court to return to this court the entire record, and it is before the court. It would seem therefore to be absurd to say that this court could not look into the record to any extent to ascertain whether or not a party's rights had been denied, if such rights are guaranteed by the constitution and the federal statutes. In the case of Watson v. Tarpley, 18 Howard, 517, the court said: "Whilst it will not be denied, that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot effect, either by enlargement or dimunition, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and constitution. This is a position which has been frequently affirmed by this court, and would

seem to compel the general assent upon its simple enunciation."

In the case of Amis v. Smith, 16th Peters, 313 the court said: "But when the effect of a state decision is only to regulate the practice of courts and to determine what shall be a judgment, and the legal effect of that or any other judgment, this court cannot consider themselves bound by such decisions, upon the ground that the laws upon which they are made are local in their character. It is the duty of this court, by their decisions, to preserve the supremacy of the laws of the United States, which they cannot do without disregading all state laws and state decisions which conflict with the laws of the United States."

If the Court does examine the entire record it will find that similar contracts to those put in evidence in this case, and found by the referee, were made by nineteen different harrow manufacturers; that the parties were located in different States; that they sold their products throughout the entire Union, and that the combination effectually monopolized the trade in this useful implement. It requires no argument, under such circumstances to show that the contracts are void under the federal statute for the same contracts have been repeatedly held void at common law, and I have shown above that they refer to interested commerce.

There are some cases in the federal courts in which the question of a party's right to institute equity proceedings under this statute has been passed upon. None of them have any application to the case at bar. The plaintiff in error in this case fights with a shield not with a sword. The statute declares "any contract" in restraint of inter-state commerce illegal. If the contract is void most certainly any court has jurisdiction to pass upon it provided one of the contracting parties seeks to enforce it in such court. This conclusion is too self-evident to require any discussion.

Still further, the defndant in error is in a very embarassing position if it seeks to raise this question, for it has expressly stipulated that this point was properly before the court. Sub-division 4 of the stipulation before referred to provides as follows:

"Whether or not the contract 'A' and 'B' are valid under the act of Congress approved July 2, 1890, Chapter 647 of the first session of the 51st Congress."

Rec. 390.

GENERAL REMARKS.

Monopolies originally were bestowed by kingly prerogative. Abuses were so great however under them that the people of England, through Parliament, declared them, with two exceptions, patent and copyright, to be injurious to the pub-

lic good, and provided severe penalties against those engaged in them. In modern times monopolies have grown to such proportions as to threaten serious consequences to the liberties of the people. It is said that they have no conscience, no care for the well being of the community, that their sole purpose is greed. From the World Almanac for 1900, that wonderful compendium of useful knowledge, it appears that the enormous amount of money invested in trusts and monopolies is more than five billion of dollars, a sum greater than the assessed valuation of all the Southern States, greater than the assessed valuation of the real and personal property of the largest five cities in the land. In view of these facts courts should weigh well the decisions which tend to foster and promote monopolies. The danger to this republic predicted by Lord McCauley, can be better averted by the courts than elsewhere, as before them the rich and the poor stand the same. But, monopolists do not always appear in person; they are, usually, behind the thin veil of a corporation; nor do the people always appear in proper person; they do appear however at all times, representatively in any party who opposes an adjudication which will deny to the public free access to the markets of the land. Such is the case at bar.

The man who tills the soil should be protected from combinations and monopolies, because it is not he alone who suffers from the oppressor. The entire community is dependent upon his suc-

cess in his occupation, and whatever effects him detrimentally effects the entire people. This particular monopoly puts its hand upon the tiller of the soil and compels him to pay exhorbitantly for one of the means, not only of gaining his livelihood, but of producing food for the people of the commonwealth. No spacious argument or fine spun theory can successfully assail the position of the plaintiff in error in this case. It has established that an illegal combination of manufacturers to control the production and sale of a necessary implement of husbandry to the detriment of the user and of the public at large. The court should pronounce such judgment as will uphold the rights of the plaintiff in error, and the public against a greedy monopoly.

FINALLY, The decision should be that the plaintiff in error is entitled to judgment that the contracts sued upon are in restraint of trade and commerce between the states and are void.

HENRY J. COOKINHAM,
Counsel for Plaintiff in Error.

Office Supreme Court U.S.
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Supreme Court of the United States.

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Reply Brf. of Cahill & Wood for P. E.

E. Bement & Sons,
Plaintiff in Error

Filed Mar. 27, 1902.

v.

National Harrow Co.
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

I.

The brief of counsel for defendant in error might lead one to believe that the contest in this case was over the facts, and the size of the record might give some color to that claim. The fact is, however, that there is not and never has been any controversy over the facts in this case so far as they relate to the questions which are before this court. The main facts upon which plaintiff in error relies to reverse the judgment were all put in evidence by the defendant in error, or were conceded by its counsel at the hearing. The question of fact that was controverted at the trial was as to what constituted a float spring-tooth harrow, and this record might better have been much shorter.

In reviewing the brief for defendant in error, we feel safe in saying that while it contains some things that are not in the record, and states inaccurately, sometimes, what the record shows, yet it contains ample admissions of fact to support the contentions of plaintiff in error, and to entitle it to a reversal of the judgment. Notwithstanding these admissions, there are some things in his brief to which we desire to reply.

It would seem from the brief of counsel for defendant in error that he has unique ideas of what are questions of fact and what are questions of law. When an appeal was taken in this case from the Supreme Court to the Appellate Division of that court, the counsel for the parties, to simplify the record, stipulated that certain questions and only those should be raised by the appellant on such appeal. Referring to this stipulation on pages 8 and 9 of his brief, counsel says that all such questions, except the 8th, referred to questions of fact.

Among the questions which counsel calls questions of fact are the following:

1. The validity of the contracts A and B attached to the complaint.

2. Whether or not the acts of the defendant in executing the contracts A and B were and are *ultra vires*.

4. Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890.

That counsel is serious in claiming these are questions of fact, and not of law, appears from page 54 of his brief. In speaking again of those questions which had been agreed upon as the questions involved in

the case he says: "All of those questions, except the 8th, were questions of fact, and not of law."

Counsel seems to believe, also, that the Court of Appeals regarded the conclusions of the referee upon the questions of law involved as findings of fact. He says at page 55 of his brief, "the Court of Appeals held and decided that under the statute and constitution of the state of New York, it was deprived of the power to consider any questions of fact, and that *the record showed no questions of law for review.*"

This is, however, going too far. We cannot bring ourselves to believe that the Court of Appeals did not know the difference between the findings of fact, and the conclusions of law. The decision of that court can be accounted for upon much more reasonable grounds. That court felt itself bound, absolutely, by the findings of the referee, as to the facts. The findings of fact by the referee were very brief, and somewhat obscure. His conclusions are so freely intermingled with his facts, that the counsel for the defendant in error has been grossly deceived.

We think the Court of Appeals in the hurry of business was mistaken as to the scope of the referee's findings of facts. The opinion seems to be based upon the idea that the referee found very little beyond the fact that license contracts A and B were executed for a valuable consideration, and reached the conclusion that such contracts, standing alone, did not import anything unlawful. We shall try to point out that the referee's findings went much further.

If the referee was a lawyer at all fit to hear a case of so much importance, he could not ignore the important fact that the Harrow Company's counsel, when he put in evidence the license contracts A and B, put in

evidence at the same time the three other contemporaneous papers, exhibits 3, 4 and 5, having reference to the same transaction. If we refer to page 15 of Mr. Risley's brief, paragraph 9, we see that he there admits that exhibits 1, 2, 3, 4 and 5 were received in evidence at the beginning of the trial. They were offered by Mr. Risley. (R. pp. 72 and 73.) To say that the referee intended to ignore the existence of these papers (exhibits 3, 4 and 5), is to impeach not merely his judgment, but his integrity as well. We shall assume that the referee was not dishonest.

That the referee did not intend to ignore any of these papers, but that he considered and construed them all together, is, we think, to be made out from the language of his report, as quoted in Mr. Risley's brief, commencing at page 51. He says:

"The referee on the evidence found:

"First, That the contracts in dispute, *including* "those contracts set out in the complaint, constituted "an absolute sale by the defendant (plaintiff in error) "to the National Harrow Co. of New York of the U. "S. letters patent, and licenses under the U. S. letters "patent * * * * were founded upon a good, "valuable, and adequate consideration, moving between the parties.

"Second, That the sales by the plaintiff in error of "its *patents and rights under the U. S. letters patent*, "including contracts attached to complaint, were "intended to and did settle existing controversies with "reference to the rights of the National Harrow Co. "of New York and the defendant."

Neither of these findings had reference to the license contracts A and B, exhibits 1 and 2, but had reference to exhibit 3, which is the paper showing an assign-

ment of the patents from the Bements to the Harrow Company, and it is this contract, exhibit 3, which the referee construed and found to be valid.

It was of all these papers that the referee was speaking when he said (see top of page 65 of Record): "I decide that the contract entered into in June, 1891, including the contracts A and B, between the National Harrow Co. of New York and this defendant, were good and valid contracts founded on adequate consideration, and were reasonable in their provisions, the contracts A and B imposing no restriction upon the defendant beyond those which the parties had a right from the nature of the transaction to impose and accept.

It was of all these papers that the referee was speaking when he said (bottom of page 67 of the Record):

"I decide that plaintiff is entitled to judgment in "this action against the defendant as follows:

"2. Decreeing that the contracts, including con- "tracts A and B, are good and valid contracts in law."

If he had in mind only "A and B," why use the word "including"?

Referring again to Mr. Risley's brief, page 52, paragraph 5, we find that he so understood the referee's finding, for he there says, "he (the referee) further found that *all the contracts in evidence* were legal, valid, and binding contracts," etc.

We shall assume that we have made it clear to the court that the referee found that all these papers, including exhibits 1, 2, 3, 4 and 5, were executed by the parties and went into effect as valid contracts.

The referee having found these facts, he will be held

to have found also certain other facts.

Dyke v. Spargur, 143 N. Y. 651.

Easthampton v. Bowman, 136 N. Y. 521.

(a) All the facts which appear upon the face of such papers as he found had been executed.

(b) All the facts which were necessary to support the findings that the contracts between the parties had been executed and gone into effect.

If this be conceded, then his findings of facts are considerably broader than a cursory reading of his report might indicate, and includes of a necessity a finding of the following facts:

1. That all those papers were contemporaneous and related to the same subject matter.

2. That like agreements between the National Harrow Co. and nineteen other manufacturers of float spring-tooth harrows were drawn up simultaneously with the contracts between the Harrow Company and Bements, and that none of them were to take effect until they all took effect.

3. That all these contracts undertook to fix the price at which float spring-tooth harrows should be sold throughout the United States, and contained many drastic provisions to that end.

4. That the contracts related to interstate commerce. These facts all appear on the face of the papers which the referee found had been executed.

5. The finding by the referee that the contracts were executed by Bements, necessarily carried with it the finding of a further fact, viz.: that similar contracts were entered into between the Harrow Company and the other manufacturers, without which the contracts with Bement were not to take effect.

With such facts before him, the question of the

validity of these contracts was a pure question of law, and they should have been held to be illegal, both by the referee and by the Court of Appeals of New York, under its own construction of its power and authority in the premises. It was held by the Court of Appeals in its opinion (see page 2 of the Appendix) that there are only three questions of law which that court can review, and one of these questions is, whether the conclusion of law of the referee is supported by the facts found by him. We venture the opinion that if the Court of Appeals had carefully analyzed the report of the referee and had come to understand that his finding covered all the facts we have indicated, that court would have reached the conclusion that such facts did not support the judgment, and their failure to reach that conclusion was a denial of the right of plaintiff in error under the federal ~~final~~ statute which this court has jurisdiction to review.

If we are wrong in our conclusion that the referee intended to find the facts which were undisputed, then his report should be treated as an attempt at a suppression of the facts, instead of a finding, and ought not to conclude any court. (See opinion of Bartlett, J., Appendix 21 and 22.)

The counsel for defendant in error lays stress upon the point that this court is bound by the findings of facts made by the State Court.

If it be conceded that this court is bound by the findings of facts of the State Court, to the finding of which court would it look if they did not agree? Would it look to the findings of the referee, or to those of the Appellate Division which has authority to review those of the referee? Certainly this court will

look to the findings of the court of last resort having jurisdiction of the facts unless there is some rule of law, binding upon this court, which forbids it.

Counsel for defendant in error claims there is such a rule, and cites Section 1338 of the New York Code, printed in the opinion of the Court of Appeals (Appendix, p. 3.) But the language of this provision, as well as the history of its amendment in 1895, as related in the opinion of the Court of Appeals in this case, shows that it was intended to be a limitation upon the power of the Court of Appeals of New York to review cases upon the facts.

But this statute does not purport to be a limitation upon any other court. Is it binding upon this court to the extent that this court is bound to presume that the Appellate Division agreed in all things with the referee as to the facts and did not find any additional facts? In other words, will this court permit a presumption created and intended to limit the jurisdiction of the Court of Appeals of New York to govern it in the face of the opinion of the Appellate Division, if it clearly shows that that court found the facts for itself, and in the face of the statute requiring it to do so?

The Court of Appeals seemed to incline to the view that the Appellate Division intended to find the facts for itself.

"The printed 'case' is not without indications that the learned justice who wrote for the Appellate Division intended a reversal upon the facts, etc." Opinion Ch. Justice Parker, Appendix 1.

This is further evidenced by the very frank admission of counsel for defendant in error, on page 54 of his brief, where he says: "If we are permitted to look

into the opinion of the court to determine upon what questions of law the Appellate Court reversed the judgment, it at once appears that the reversal of the judgment in the minds of the Appellate Court, as stated in its opinion, was on questions of fact."

If Section 1338 is not a limitation upon the power of this court, what is there to prevent the court's considering the case exactly as though that provision of the Code did not exist? If it did not exist, would not this court look into the opinion of the Appellate Division to see what it found the facts to be and take the facts so found in preference to those found by the referee if it took either?

If this be done, it will be seen that the learned justice who wrote for the Appellate Division took a broad view of the case, construed all the papers which were conceded to have been executed at the same time as parts of a single contract, gave due effect to the undisputed facts and circumstances showing a combination of substantially all of the manufacturers of harrows in the United States to control the trade, and reached the conclusion that the contracts were void in law as in restraint of trade.

It is not a matter of surprise that it did not occur to the Appellate Division to certify that it was reversing the referee's decision on questions of fact. So far as the facts affecting the legality of these contracts are concerned, there never has been any dispute about them. The referee made what is known as "a short decision," and Section 1022 of the Code did not require him, nor could either side call on him, to state all the facts. He could only be required to state "concisely the grounds on which the issues had been decided."

The practice under the New York Code, which permits the referee to make a "short decision," and deprives the parties of the right to call upon him for a fuller finding of facts (see opinion of Court of Appeals, Appendix, pp. 9 and 10) finds its justification in the fact that his decision is not final and that an appeal lies upon the facts, as well as the law, to the Appellate Division. It is to the opinion of the Appellate Court or to the record that this court *must* go for a full statement of the facts, for they do not appear, and the law does not require them to appear, in the report of the referee.

"It is elementary that if from the decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court, in order to throw light upon the subject." National Foundry & Pipe Works vs. Oconto City Water Supply Co., 22 Sup. Ct. Reporter 111, and cases cited.

We must not lose sight of the fact that under the New York Code plaintiff in error had no way of securing a fuller finding, and that no exception could be taken to the omission of the referee to find facts requested. (Appendix to main brief, pp. 9 and 10.) The general exception to the finding and report of the referee and the specific exceptions to the conclusions of law, were duly taken. (Record, p. 368.) "It thus appears that by pleading, proof and exception, the defendant has availed himself of every remedy afforded by the Code of Civil Procedure." (See dissenting opinion of Justice Bartlett, Appendix to main brief, p. 22.)

How can it be said the Appellate Division reversed the findings of facts of the referee, when as a matter of

fact it did not dissent from any fact found by him, but simply made a fuller and clearer statement of *facts, which as we have seen* were necessarily within the purview of the referee's findings. It is a misuse of words to say that a case is decided upon the facts when the facts are not in dispute and the question is one of pure law.

We know of no better illustration of this than is to be found in the dissenting opinion of Mr. Justice Bartlett of the Court of Appeals, printed in the Appendix of our original brief, pages 21 and 22.

Take another illustration: Suppose this case had been tried before a jury, the contracts had been put in evidence, the circumstances under which they were made proved by the plaintiff's own witnesses, including the fact that eighteen out of twenty of the manufacturers of float spring-tooth harrows in the United States had combined together in making such contracts, would the question of the validity of such contracts be one of fact for the jury or one of law for the court? What question of fact would there be to go to the jury?

II.

Was a Federal question raised?

Counsel for defendant in error, in various parts of his brief, says that a Federal question was not raised in the State Court.

What could the plaintiff in error do more than it has done to secure the protection of the Federal statute? It pleaded it. The record discloses ample facts, which are either conceded or uncontradicted, to support the plea. Could the referee, by his failure to

find facts, which were clearly proved and not controverted, eliminate such facts from the case so as to bind this court and deprive the plaintiff in error of his rights under the constitution and laws? The decisions of this court cited on pages 23 and 24 of our original brief are against it. To so hold, would be to say in effect that this court is, after all, in the hands of the State courts and that it cannot protect a citizen whose rights under a Federal statute have been invaded if the State Court *fails to find* the facts which show him to be entitled to such protection, even though such facts are conceded or conclusively proved.

The theory upon which this court has been given and exercises the right to review the judgments of State courts, is that the latter may, through mistake, ignorance, or even wilfulness, fail or refuse to give effect to the constitution and laws of the Union. What a citizen of the United States is entitled to at the hands of this court, is its judgment as to whether, *upon the whole case as submitted to it*, the Federal constitution and laws, to which he has appealed, afford him protection. This right may not be secured to him by the judgment of this court upon the law, merely. Whoever is allowed to state the facts of a case has gone far towards determining the law.

We are aware of the rule stated in Dower vs. Richards, 151 U. S. 658, and later cases, that "*when the facts are found below*, this court is concluded by such findings." But none of those cases go farther than to hold that the same rule will be applied to cases in equity, brought up by writ of error to a State Court, that has always been applied to suits at law. What, then, is that rule? It has always been good ground of error that the judgment was not supported by the

admitted facts or the undisputed evidence, and, in such case, when a bill of exceptions has been settled and sent up with the record, the Appellate Court will examine the record to determine whether there is any conflict in the evidence. The reason for this rule is that every judgment must have evidence tending to support it, and when the evidence is undisputed or the facts admitted, it is always a question of law whether such facts do support a judgment.

In Alexandre vs. Machan, 147 U. S. 72, Mr. Justice Brown states the rule as follows in an admiralty case:

"3. If the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court. The Francis W. Wright, 105 U. S. 381; The E. A. Packer, 140 U. S. 360; 11 Sup. Ct. Rep. 794."

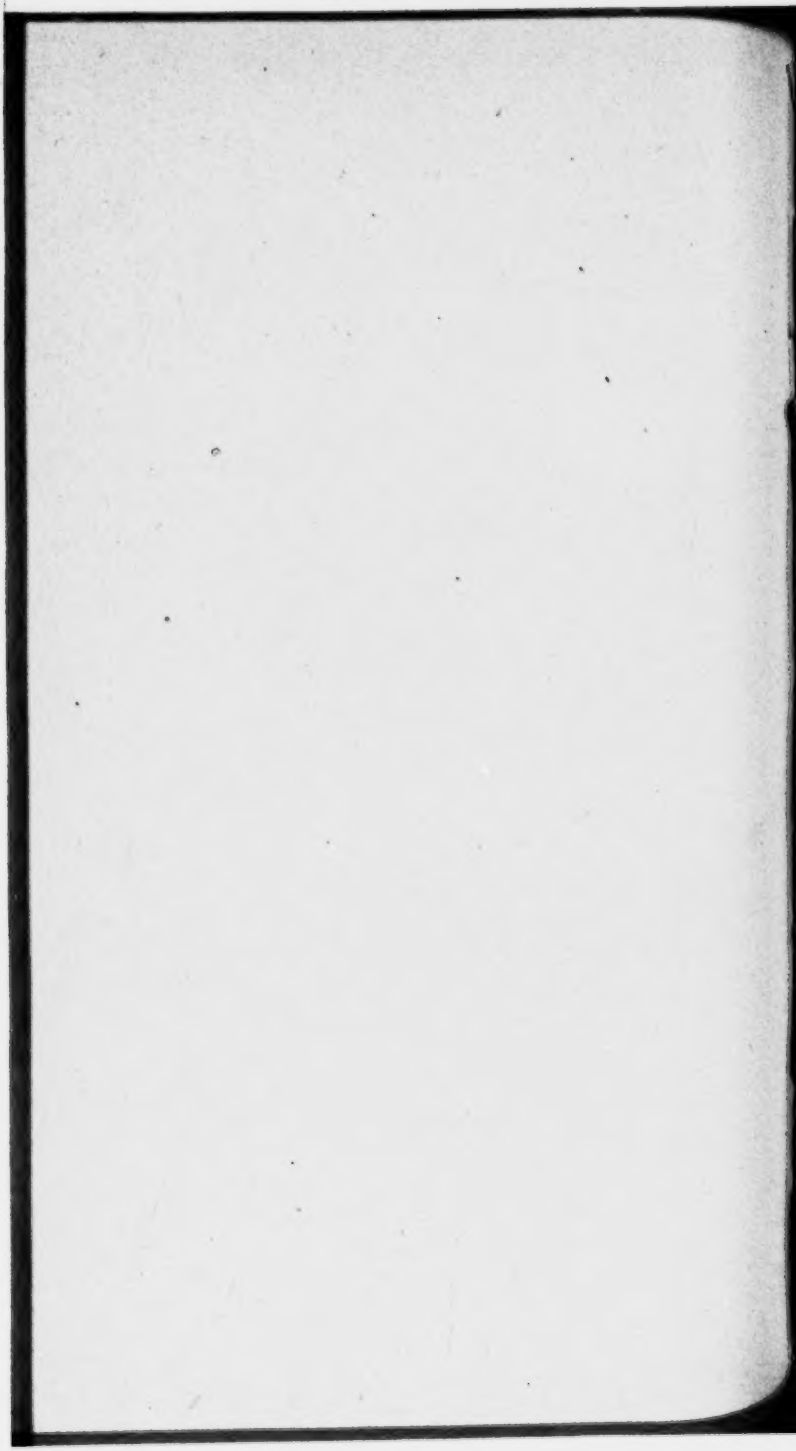
III.

CAN PLAINTIFF IN ERROR CLAIM THE PROTECTION OF THE ANTI-TRUST STATUTE IN THIS ACTION?

Counsel for defendant in error cites several cases which hold that under the anti-trust law, a private party cannot maintain a bill for an injunction for an alleged breach of the act except through the District

Attorney on the authority of the Attorney General. But those cases have no relevancy to the question here. If the contracts in suit in this case are of the class which are declared by the act of Congress to be illegal, then they are illegal for all purposes, and everywhere, and it is the duty of every court, State or National, before which such contracts are sought to be enforced, to declare their illegality and to refuse to enforce them. This duty rests as much upon the State as upon the Federal courts, and the failure of the State Court to perform its duty in this regard is a wrong against the plaintiff in error, which this court will redress.

EDWARD CAHILL,
CLARK C. WOOD,
Solicitors for Plaintiff in Error.



Office Supreme Court
FILED
OCT 7 1901
JAMES H. McKENNEY,
Clerk.

No. 215.

NOTICE OF MOTION TO DISMISS THE WRIT OF ERROR AND BRIEF

Brief of Tenney for D. C. (mo.

Filed Oct. 7, 1901.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 215.

E. BEMENT & SONS,
Plaintiff in Error,
vs.
NATIONAL HARROW COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

The defendant in error, the National Harrow Company, now comes into this court on the 14th day of October, 1901, at the opening of the court on that day or as soon thereafter as this motion can be heard by this court and moves this court to dismiss the writ of error herein on the following ground:

That the record in this case fails to disclose that any question was raised or decided in the Court of Appeals of the State of New York in which any treaty of the United States or any laws of the United States or any constitutional provision of the United States or any right granted or prohibited by any treaty of the United States or any law of the United States or any constitutional provision of the United States was involved.

And further, that the record fails to disclose that any federal question was involved, raised or decided by the Court of Appeals of the State of New York, and for such other and further relief in the premises as may be just and equitable.

Dated October 3, 1901.

Yours, &c.,

EDWIN H. RISLEY,

Att'y and of Counsel for Defendant in Error,

O. and P. O. Address, Herald Bldg., Utica, N. Y.

To EDWARD CAHILL, CLARENCE WOOD, *Lansing, Mich., Attorneys and of Counsel for Plaintiff in Error.*

HENRY J. COOKINHAM, *Utica, N. Y., of Counsel for Plaintiff in Error.*

EDWIN H. RISLEY,
Of Counsel for Defendant in Error,
Utica, N. Y.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 215.

E. BEMENT & SONS,
Plaintiff in Error,

vs.

THE NATIONAL HARROW COMPANY,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR, ON THE GROUND THAT NO FEDERAL QUESTION IS INVOLVED.

STATEMENT.

The record has been printed and served.

The decision and remittitur of the New York Court of Appeals will be found in the record at pages 1 and 2.

The judgment and decision of the New York Court of Appeals was by an order of the Supreme Court made its judgment. Record, p. 405.

The judgment of the trial court, which was affirmed by the Court of Appeals, is in the record at pages 68 to 70.

The decision of the trial court is in the record at pages 62 to 68.

The exceptions, which raised questions of law in the case, were by the act of the parties stipulated out of the case after the judgment had been entered on the decision of the referee. Record, pp. 389 to 392.

The assignment of errors will be found in the record at pages 412 to 414.

The only assignments of errors which can be claimed as having any possible application to the questions here raised are, I½, XII, and XIII.

FACTS.

The suit was in equity to restrain the plaintiff in error from violating two contracts and for an accounting and damages.

(*See Contracts A and B. Rec., pp. 7 to 19.*)

The plaintiff in error set up, amongst many other defenses, that the contracts "are in violation of and "to that end, defendant (plaintiff in error) expressly "pleads the Act of Congress of the United States, ap- "proved July 2, 1890, being Chapter 647 of the first "session of the Fifty-first Congress, entitled 'An Act "to Protect Trade and Commerce against Unlawful "Restraints and Monopolies.'"

Record, p. 41.

The trial court found and decided as follows:

"That all of the contracts in evidence were and are "legal, valid and binding contracts, such as might "reasonably be made under the circumstances, founded "upon an adequate consideration, and that they em- "bodied no illegal restraint, and are not repugnant "to any rule of public policy as in restraint of trade, "or tending to create a monopoly, trust, or any other "illegal combination; and that the contracts entered "into between the defendant and the National Har- "row Company of New York, including contracts A "and B, are and were intended to be continuing con- "tracts, and should be enforced according to their "true intention and meaning as hereby interpreted."

Record, p. 67.

The New York Appellate Division of the Supreme Court on an appeal from the judgment entered on the decision of the referee reversed the judgment and ordered a new trial. In their amended order and judgment of reversal the court say:

"Ordered, adjudged and decreed that the judgment "so appealed from be and the same is hereby re- "versed on grounds other than those arising on the "exceptions taken to the decision of the referee in re-

"ceiving or rejecting appellant's evidence, and a new "trial is ordered."

See Order Record, p. 393 *; also amendatory order p.* 394.

The parties entered into an agreement which was and is in the record, by which they agreed that the questions which should be raised in the New York Appellate Division were "to be only as follows:" * * * 4. Whether or not the contracts A and B are valid under the "Act of Congress approved July 2, 1890, "Chapter 647, of the first session of the Fifty-first "Congress." * * * Second, it is stipulated that the exceptions taken by the appellant (the plaintiff in error) to the rulings by the referee in receiving or rejecting evidence, are waived in the Court of Appeals, in the event of the judgment being reversed in this Court (N. Y. Appellate Division of Fourth Department of N. Y.) on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's (plaintiff in error) evidence, and this clause of the stipulation is to operate upon the present appellant (plaintiff in error) in the Court of Appeals in the event of the appeal."

Record, p. 389, 390, 391.

The second clause of the stipulation was made opperative in the Court of Appeals by the order and judgment of the Appellate Division of the Supreme Court before quoted.

There was no finding by the Trial Court that the subject of the litigation related to an article of inter-state commerce, nor was there any facts alleged, or proven from which the Trial Court could have made a finding that the contracts involved a question of inter-state commerce.

The contracts were executed in the State of New York, and by their terms were to be performed, in that State and it was agreed that they were to be interpreted under the laws of that State.

See Clause 17, *Rec., pp.* 11 *and* 18.

POINTS.

I.

The statute of New York State limited the Court of Appeals, solely to the examination of questions of law. The statute is :

"Upon an appeal to the Court of Appeals from a "judgment, reversing a judgment entered upon the "report of a referee, or a determination in the Trial "Court ; or from an order granting a new trial, upon "such a reversal ; it must be presumed that the judg- "ment was not reversed, or the new trial granted, "upon a question of fact, unless the contrary clearly "appears in the record body of the judgment or order "appealed from."

N. Y. Code of Civil Procedure, § 1338.

Neither the order nor judgment appealed from contained in the record body a statement that the judgment appealed from was reversed and a new trial granted "upon a question of fact."

The stipulation previously quoted took out of the case all exceptions which would raise any question of law in the New York Court of Appeals.

Aside from this the interpretation of the statutes of the State by the Court of Appeals bound it to accept the findings of the Trial Court, and the only question of law left the court to decide on the appeal was whether the facts found by the referee warranted the conclusions of law.

National Harrow Co. v. Bement & Sons,
163 *N. Y.*, 505, *and cases there cited.*

(*a*) The Constitution of New York State, adopted in 1895, limited the inquiry in the Court of Appeals "to the review of questions of law."

Article VI, § 9.

The Court of Appeals, therefore, rightly held that there was no questions of law open for review in that court.

No federal question was in issue or decided in the Court of Appeals.

II.

This court under a long line of adjudications has held that it is bound by the decisions of the highest court of a State touching the interpretation of its laws and its Constitution.

Western U. T. Co. vs. Call. Pub. Co.,
181 *U. S.*, 92.

Gardner vs. Bonesteel, 180 *U. S.*, 262.

Merchants' Bank vs. Pennsylvania, 167
U. S., 461.

Commercial N. Bank vs. Chambers, U.
S. S. Ct. Dec., July 1, 1901, *p.*
863.

Yazoo & M. Ver. Co. vs. Adams, U. S. Sup. Ct. Dec., June 15, 1901, *p.* 729.
Mattee vs. No. Carolina, U. S. S. Ct. Dec., June 15, 1901, *p.* 730.

The decision of the Court of Appeals touching its power of review of the cases before it must in the nature of things be accepted by this court as conclusive.

III.

There are no facts pleaded or found which show or tend to show that the questions involved in this record related to an article of interstate commerce. The fact that the agreements were licenses to use certain United States letters patent under stipulations does not raise a federal question.

Dale v. Hyall, 125 *U. S.*, 46–54.

IV.

In order to raise a federal question in this court the record must show that a federal right, privilege or immunity was claimed, either under the Constitution, treaties or laws of the United States, and a distinct and definite issue taken therein and that the decision of the State court was adverse to such Constitution, and such a question cannot be raised in the assignment of errors or in a stipulation made after the trial and decision of the case.

Cin., H. & D. R. R. Co. v. Thiebaud, 177 *U. S.*, 615–621.

Cornell v. Green, 163 *U. S.*, 75–81.
Ausbrow v. U. S., 159 *U. S.*, 695–698.
Muse v. Arlington, 168 *U. S.*, 430–437.

There is not one word in the record which shows or tends to show that a federal question was decided either in the Trial Court or in the Appellate Division or in the Court of Appeals.

(*a*) There was not only no federal issue distinctly raised, but the findings of the Trial Court, which are as binding on this court as they were on the Court of Appeals, distinctly found that there was no trust or other monopoly involved in the contract.

This finding is conclusive in this court.

V.

The writ of error should be dismissed and the case remanded to avoid further expense.

Utica, October 2, 1901.

EDWIN H. RISLEY,
Attorney and Counsel for Defendant in Error.

Office Supreme Court
FILED
MAR 6 1902
JAMES H. McKENNEY, Clerk.

No. 215.

EDWIN H. RISLEY.
Of Counsel for Defendant in Error,
Utica, N. Y.

Brf. of Risley for D. E.

SUPREME COURT,

Filed Mar. 6, 1902.

OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 215.

E. BEMENT & SONS,

Plaintiff in Error,

vs.

THE NATIONAL HARROW COMPANY,

Defendant in Error.

FILED DEC. 19th, 1900.

(18,003.)

BRIEF ON THE MERITS FOR THE DEFENDANT IN ERROR.

MOTION TO DISMISS.

The motion to dismiss the writ of error and the briefs filed therewith at the opening of the present term of this Court and ordered to be heard with the merits, is now urged for final determination by this Court.

STATEMENT.

The writ of error to this Court brings up for review the judgment and proceedings of the N. Y. Court of Appeals, reported in 163 N. Y. 505.

Rec. pp. 1 and 2.

The decision of the N. Y. Court of Appeals was made the judgment of the Supreme Court of that State by an order of the latter Court.

Rec. p. 405.

The decision of the Trial Court found all the material issues in favor of the defendant in error.

Rec. pp. 62-68.

All exceptions and rulings of the Trial Court taken in the progress of the trial and all exceptions taken to the decision of the Trial Court, saving only eight separate questions, were eliminated from the case in the Court of Appeals by the agreement of the parties.

Rec. pp. 389-392.

The assignment of error in this Court is in the record at pp. 412-414.

The assignment of error which is supposed to raise

a Federal question are numbered I, ½, XII, and XIII, pp. 412, 413, 414.

The suit is one in equity brought by the defendant in error against the plaintiff in error to restrain a repetition of breaches of two contracts which licensed the plaintiff in error to use certain United States letters patent during the lifetime of the patents on which the licenses were based and to restrain the plaintiff in error from committing further breaches of the contracts.

See Contracts, Rec. pp. 7-19.
Exhibits A and B.

The plaintiff in error set up as a defense to the contracts, that they were in common law restraint of trade and were therefore void.

See answer, Rec. pp. 23-31.
See Exhibit attached to the Answer, Rec. pp. 32-59.

Among other defenses set up in the answer, it was in substance alleged that the contracts, A and B, were and are void and the plaintiff in error expressly pleads the Act of Congress of the United States, approved July 2nd, 1890, being Chapter 647 of the first session of the 51st Congress entitled "An Act to Pro-"tect Trade and Commerce against Unlawful Re-"straints and Monopolies."

Rec. p. 41.

The issue attempted to be raised by this statement in the answer was not raised or passed upon in either the Trial Court or on appeal to the Appellate Division or in the Court of Appeals, except it was one of

the questions embraced in the 4th paragraph of the agreement of the parties.

Rec. p. 390.

The issues raised in the case were by an order of the court duly referred to Hon. William A. Matteson, of Utica, N. Y., to hear, try and determine the case, and his decision stands by the laws of the State of New York as the decision of the Supreme Court of that State.

See Order, Rec. pp. 59–60.

The Trial Court decided that all of the contracts in evidence, several in number, were valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant (plaintiff in error) and the National Harrow Company of New York, including contracts A and B, by their terms were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

Rec., p. 67.

The decision of the trial Court will be found in the Record at pp. 62–68.

The judgment entered upon the decision of the court will be found in the Record at p. 71.

The federal question as to whether the contracts were affected by the act of Congress of July 2d, 1890, was not raised in the trial Court by any specific ob-

jection, motion or ruling, nor was that question raised or presented to the court for its decision.

The plaintiff in error took an appeal from the judgment entered on the decision of the trial Court to the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Department.

Rec. p. 368.

After the case had been argued in the Appellate Division and submitted to the Court for its decision, it was found that the record as presented did not contain a certificate which permitted that Court to examine or review the facts. A motion was made by the plaintiff in error to be relieved from this objection, the Appellate Court made an order on terms that the appellant (plaintiff in error) should make and serve a new case and exceptions within thirty days, which should contain all the evidence and proceedings had before the trial Court and the Court ordered the case to be sent back to the trial Court for resettlement.

See order, Rec. pp. 386-387.

The plaintiff in error failed to comply with the requirements of this order by omitting to make and serve a new case and exceptions containing all of the evidence and proceedings had before the trial Court. On the settlement of the case and exceptions before the trial Court, it refused to grant the necessary certificate that the record did contain all of the evidences and proceedings had before that Court.

Rec. pp. 388-389.

The record on the appeal, therefore, was not in position to enable the Appellate Court to pass upon and review questions of fact raised by the evidence.

The parties then entered into a stipulation in writing in which was recited the various steps taken on the appeal in which it was stipulated as follows:

"First. That the foregoing record as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee, material to the questions to be raised on this appeal by the appellant (the plaintiff in error), which questions to be raised by the appellant (plaintiff in error) on this appeal are to be only as follows:

"1. The validity of the contracts A and B attached to the complaint.

"2. Whether or not the acts of the defendant in executing the contracts A and B were and are ultra vires.

"3. Whether or not this plaintiff has lost its right to sue by not commencing to make the manufactured articles prior to the bringing of this suit.

"4. Whether or not the contracts A and B are valid under the 'act of Congress approved 'July 2, 1890, chapter 647, of the first session 'of the 51st Congress.'

"5. Whether or not the 'Lever,' 'Lansing,' and 'Reliance' harrows are and were, and are and were known to the trade as 'float spring 'tooth harrows.'

"6. Whether or not the five dollars ($5.00) provided for as liquidated damages in contracts A and B are liquidated damages or whether it is a penalty.

"7. As to the number of harrows sold in viola-
"tion of the contracts and as to the amount of
"damages.

"8. The exceptions taken to the evidence.

"Second. It is stipulated that the exceptions
"taken by the appellant (plaintiff in error) to
"the rulings of the referee in receiving or reject-
"ing evidence are waived in the Court of
"Appeals, in the event of the judgment being
"reversed in this court (Appellate Division,) on
"grounds other than those arising on the excep-
"tion taken to the decision of the referee in re-
"ceiving or rejecting appellant's (plaintiff in
"error) evidence, and this clause of the stipula-
"tion is to operate upon the present appellant
"in the Court of Appeals in the event of the
"appeal by the respondent (defendant in error)
"from the judgment of reversal in this court to
"the Court of Appeals."

See Stipulation, Rec. pp. 389-390-391.

This stipulation was embodied in the record and the case was then submitted to the Appellate Division for its decision.

The Appellate Court reversed the judgment and in the order and judgment of reversal it was adjudged

"That the judgment so appealed from be, and
"the same hereby is reversed on grounds other
"than those arising on the exceptions taken to
"the decision of referee in receiving or rejecting
"the appellant (plaintiff in error) evidence and
"a new trial is ordered with costs to abide the
"event."

The opinion of the Appellate Court tends to show that the judgment was reversed on questions of fact, to wit:

That contracts A and B were in common law restraint of trade.

The Federal Statute was not referred to in the opinion of Judge Follett, nor is there anything in the record to show that a Federal question was read or decided.

See opinion, Rec. pp. 396-401.

The defendant in error brought an appeal from the Appellate Court to the N. Y. Court of Appeals, where the judgment of the Appellate Court was reversed and the judgment of the trial Court affirmed.

In the opinion of Judge Parker, in the Court of Appeals (163 N. Y. 505) the decision of the case in that Court turned wholly upon the interpretation of the State constitution and laws.

The N. Y. Court of Appeals decided that under the statutes and constitution its jurisdiction was limited to considering errors of law only and that it was bound under the laws and constitution of the State of New York to accept the decision of the trial Court on the facts.

This Court should keep in mind the fact that under the stipulation of the parties, all rulings and exceptions in the progress of the trial and all questions of law raised by the exceptions to the decision of the reply were expressly stipulated out of the case in the N. Y. Court of Appeals saving only the questions reserved by the stipulation.

See questions stipulated, Rec. p. 390.

The eighth proposition submitted to the General Term to wit, "the exceptions taken to the evidence" was expressly stipulated out of the record in the Court of Appeals.

The seven remaining questions referred to questions of fact which the Appellate Division had the power if they chose to consider under the stipulation, were considered by that Court and decided in favor of the defendant in error.

The Appellate Division reversed the judgment on questions of *law only*, and there being no exceptions in the record which permitted that Court to reverse the judgment on that ground, the Court of Appeals was by the statute, and Constitution of New York and by a long line of adjudgments forced to reverse the judgment of the Appellate Court, because no errors of law appeared in the record. The Court of Appeals never passed upon the question of the Federal Statute or its application to the contracts, because that question was not raised where it could have been passed upon.

Under the Federal Statute, authorizing a writ of error to this Court from a decision of the N. Y. Court of Appeals can only be sustained, where the record shows that a Federal question, touching a treaty or a constitutional right or a Federal statute is drawn in question and the validity of a statute of, or an authority exercised under any state, or on the ground that it is repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority

exercised under, the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed.

In order to find that a Federal question is raised in this record, the plaintiff in error will contend that the contracts were made in violation of the provisions of the act of Congress approved July 2nd, 1890, Chapter 647 of the first session of the 51st Congress, and this Court will be urged to examine the facts appearing in the record to determine this question.

The defendant in error denies that it is the province of this Court to re-examine all of the facts upon which a Federal question is alleged to be based.

The plaintiff in error, contends that the findings and decision of the trial Court expressly excludes the idea that any Federal question was raised or decided by the trial Court or in the Appellate Court or in the Court of Appeals.

If this Court finds it necessary to examine the facts appearing in the record, the following statement contains a record of the facts established by the proof.

1. D. C. & H. C. Reed & Company, of Kalamazoo, Michigan, were the practical harrow pioneers. They first manufactured under the Garver patent. Some time afterward, G. B. Olin & Company of Canandaigua, N. Y., commenced to make harrows. Originally, Reed & Co. owned all the then existing

patents, and Olin & Co. were their licensees thereunder, but the patents were afterwards owned and controlled by them in separate territories. At a later period, after a great deal of litigation, licenses were taken under the patents by Chase, Taylor & Company, and Lawrence, Chapin & Company, both of Kalamazoo, Michigan; J. M. Childs & Co., of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y. The licenses were granted by Olin & Co.

Referee's Report, p. 62.
Reed, pp. 132, 137.
Childs, pp. 117, 128, 348.

2. Prior to and at the time of the agreement in the summer of 1890, for the organization of the New York corporation, the National Harrow Company, there had been and was a great deal of litigation under the patents named and others obtained and owned by Reed & Co., Olin & Co. and other manufacturers. A number of patent suits were pending between the different manufacturers and by some of them against the customers of the others. Reed & Company claimed that every one infringed their patents. They sued customers of E. Bement & Sons, which latter company had acquired the Paddock patent, and claimed that it antedated the Reed patents. This suit was defended by E. Bement & Sons, and an injunction had been obtained therein against the latter's Clipper Harrow. The Eureka Mower Company had also been enjoined from making its harrows. A final decree had been entered against Chase, Taylor & Co. and W. S. Lawrence, establishing the validity of the patents they infringed and ordering an accounting of profits. E. Bement & Sons had sued G. B. Olin & Co. for alleged infringements of the Paddock patent. Thousands of dollars had been expended by the various manufac-

turers in these litigations and matters connected therewith. Customers of the different manufacturers were threatened by the other manufacturers with suits for the infringement of patents. In some instances, users of the harrows made under the Garver patent had been compelled to pay ten dollars for each harrow. The trade was thoroughly demoralized. Reed & Co. and Olin & Co. had compelled J. M. Childs & Co. to pay about $10,000; Lawrence Chapin & Co., $25,000, and A. W. Stevens & Son between $30,000 and $40,000, as royalties and damages for harrows manufactured and sold by those firms.

Referee's Report, p. 62.
Reed, pp. 137, 138.
Childs, pp. 128, 333.
Brinkerhoff, p. 328.
Bement, pp. 183, 233, 236.

3. After an examination of patents submitted "by "every claimant and the drawings and claims there-"under," under the arbitration agreement hereinafter mentioned, Mr. Cookinham and the other arbitrator found as facts: "That many of the harrows manu-"factured by licensees who commenced manufactur-"ing the particular style of harrows made by them "within the last few years, infringe many of the "patents held by licensees, who preceded them in "business.

"That the licensees who commenced the business "of manufacturing harrows within the past few years, "have procured patents upon certain devices or com-"binations applicable to harrow, but that many of "such patents are of little value in comparison with "the older patents, which clearly anticipate the later "ones; if not in every particular, yet they do antici-

"pate them in regard to many of the essential ele-
"ments employed."

pp. 313, 315.

4. The relation between the six manufacturers named in Subd. 1 was simply that of licensor and licensee, with an agreement as to prices at which harrows should be sold when made under the patents controlled by Reed & Co. and Olin & Co.

Reed, p. 137.
Childs, p. 129.

5. In the face of this situation, each of such six manufacturing firms was compelled to do something to protect its customers and business. In the summer of 1890 they agreed to form the New York corporation, The National Harrow Company. The certificate of incorporation was filed September 2d, 1890, the incorporators and directors for the first year named in the certificate being members of such firms.

Referee's report, pp. 62, 63.
Concession, p. 129.
Certificate of Incorporation, p. 146.
Reed, pp. 137, 138.
Brinkerhoff, pp. 307, 308.
Bement, p. 183.

6. When the company was organized there was no agreement in reference to other manufacurers becoming stockholders thereof, or licensees under the patents to be assigned to it. The following firms and corporations were then manufacturing float spring tooth harrows and had not been seen or communicated with by any one in reference to such incorporation, or becoming stockholders or licensees

thereof, viz: The defendant, E Bement & Sons, the Eureka Mower Co., Childs & Jones, Herendeen Manufacturing Co., the Pitts Agricultural Works of Buffalo, Syracuse Chilled Plow Co., Clipper Chilled Plow Co. of Elmira, N. Y., Hench & Dromgold of York, Pa., DuWayne B. Smith Co. of Utica, McSherry Manufacturing Co., Farmers' Friend Manufacturing Co. of Dayton, O., George Sweet & Co., Dansville, N. Y., L. C. Lull & Co. of Kalamazoo, D. O. Everest & Co. of Kalamazoo, Williams Manufacturing Co., Walker Manufacturing Co. of Moravia, N. Y., John J. Fry & Co., Portland, Me., Ira Hunt of Kalamazoo, Michigan, and Peter Wilms of Holland, Mich.

Bement, p. 183.
Childs, pp. 128, 129.
Brinkerhoff, p. 307.

7. The six firms named in Subd. 1 assigned all their patents and rights under patents to the New York corporation and accepted licenses thereunder from it. On November 10th, 1890, William Strait and others, doing business under the name of The Clipper Chilled Plow Co., of Elmira, agreed to become licensees of the New York corporation and delivered, in escrow, papers to that effect, but in a suit by such firm the agreement was cancelled. Afterwards they became licensees of the New York corporation.

Referee's Report, pp. 62,63.
Brinkerhoff, p. 323.
Strait, pp. 162, 164.
Judgment, p. 364.
Letters to Deft., pp. 178, 301, 302.

8. On September 17th, 1890, the defendant agreed

conditionally to become a stockholder and licensee of the New York corporation, and papers to that effect were delivered in escrow. This agreement never went into effect, because the corporation, on the 27th or 28th of May, 1891, refused to accept the conditions. There were no operative papers between the New York corporation and defendant prior to June 17th, 1891.

Referee's Report, p. 63.
Exhibit 136, pp. 337, 338.
Risley, pp. 335, 337, 339.
Brinkerhoff, pp. 323, 326, 327.
Bement, p. 226.

9. Exhibits Nos. "1, 2, 3, 4 and 5," mentioned throughout the case, were received in evidence at the beginning of the trial as stated at fols. 72-73. They are as follows :

Exhibit No. "1," is License Contract A, annexed to the complaint and printed at pp. 7 to 13.

Exhibit No. "2," is License Contract B, annexed to the complaint and printed at 13 to 19.

Exhibit No. "3," is agreement dated April 1st, 1891, confirming the assignment, sale and transfer of patents and pending applications for patents, and selling, assigning and transferring the same, and all rights, interests and titles therein and thereunder of the party of the second part, to the New York corporation, its successors and assigns, declaring such New York corporation to be the sole and absolute owner thereof, free and clear from any and all claims, agreements and covenants in relation thereto, selling, assigning and re-conveying by the New York corporation to the second party thereto, its successors and

assigns, all the interests and property theretofore transferred to it by the said second party, including the good will of the Float Spring Tooth Harrow business of such party, and all contracts, agreements, instruments, covenants and promises theretofore executed, transferred and set over to the said New York corporation by such party; except that the assignments of and all the rights in and to under said patents, so conveyed by the said party of the second part to such New York corporation, were confirmed in it, but all other obligations, rights and interests as between the parties were cancelled and declared to be of no force and effect, and each party released and discharged from all claims for damages thereunder. It provided for the arbitration of all questions as to the value of each and every patent and rights thereunder so conveyed to the said New York corporation; that the decision of the arbitrators should be final and conclusive upon the parties thereto, and should be rendered in duplicate, in writing, before July 1st, 1891; and that the New York corporation should issue to the second party, its successors or assigns, the paid up capital stock of the New York corporation to an amount equal to the value of such patents, and all rights thereunder so assigned, as found, fixed and determined by the said arbitrators within thirty days after the ascertainment and report of such value. It is printed in the judgment roll and attached to the amended answer at pp. 50 to 52.

Exhibit "5" is the escrow agreement, dated April 1st, 1891, which provided, among other things, that in case any of the parties named therein should omit to execute and deliver the contracts and licenses on or before June 1st, 1891, delivery of the escrow

papers should be made in case of its being directed by a resolution of the Board of Trustees of the New York corporation of such as should have been signed and executed ; but if the New York corporation concluded not to accept any less number than the whole of such contracts and licenses executed by all the parties named in the escrow agreement, then Edward Norris, in whose hands the same were to be placed, should cancel each of said contracts and licenses, and they should be null and void. It is printed as part of the judgment roll at p. 50.

Exhibit No. "6," dated April 1st, 1891, provided for the payment by the party executing it to the New York corporation of $1.00 in cash for each Float Spring Tooth Harrow sold and shipped by it between September 10th, 1890, and the delivery of the license. It is printed at p. 72.

10. Exhibits "1," "2," "3," "4" and "5" were signed by all the parties named in Exhibit "4," except the Syracuse Chilled Plow Company, and delivered by them to Norris in escrow. The defendant signed and delivered them on June 16th or 17th, 1891, the controversy over the La Dow contracts, with defendant having been arranged by defendant indemnifying the New York company against all liabilities to La Dow, and releasing it from defending any litigation with him growing out of the contracts or patents owned by him, so far as applicable to the "Steel King." Defendant is litigating with La Dow and has wrested one patent from him. The papers in escrow were delivered June 17th, 1891, under a resolution of the Board of Directors of the New York corporation adopted upon Bement's motion. These Exhibits "1," "2," "3," "4" and "5" are the only agree-

ments between plaintiff and defendant that ever went into effect.

Referee's Report, p. 63.
Arbitrators' Award, p. 319.
Concessions, pp. 114, 308.
Resolution, p. 351.
Letter to Bement, Exhibit 121, p. 30.
Meeting of Licensees, pp. 350, 353.
Bement, pp. 227, 262.
Reed, p. 139.
Risley, pp. 154, 156.
Brinkerhoff, pp. 308, 309, 323, 324, 326, 327.
Bond, pp. 353, 354.

Counsel advised that the licensed contracts were within the New York corporation rights under its patents.

Childs, pp. 122, 123.

11. On June 17th, 1891, the arbitrators, Hon. H. J. Cookinham being one, proceeded to hear the arguments, make their examination, etc. All the parties who had signed the Exhibits 1, 2, 3, 4 and 5 appeared, or had their representatives before the arbitrators. Arguments were made and submitted by Bement and such other parties, or their representatives.

Referee's Report, p. 63.
Arbitrators' Award, p. 313.
Letters to Bement, pp. 304-305.
Bement, p. 292.
Risley, p. 156.
Stevens, pp. 114-115.
Reed, p. 139.
Brinkerhoff, pp. 145-147.

12. The arbitrators' award was made in June, 1891, and accepted by all, except the defendant, who insisted upon receiving more of the New York corporation's capital stock. The differences were adjusted by its being allowed and receiving $16,000 additional stock of the plaintiff. Stock of the New York corporation, and of the plaintiff, was issued and delivered in accordance with the awards to the firms and corporations, or the parties designated by some of the latter. No stock was issued to any one until after the award.

Referee's Report, pp. 63-64.
Arbitrators' Award, pp. 313, etc., 315.
Concessions, pp. 115, 320, 353.
Defendant's order and receipt, pp. 115-116.
Agreement, pp. 342-343.
Stevens, pp. 113, 115-116.
Bement, pp. 227, 261-262.
Brinkerhoff, p. 309.
Childs, pp. 348, 353.

13. By order of the Board of Directors of the New York corporation, the old agreements and licenses, which had existed with some of the licensees at the time of the entry of the Strait judgment, February 17th, 1891, were surrendered, cancelled and destroyed, they have been cancelled by Exhibit 3, except as stated therein. The separate assignments of patents, rights under patents and applications pending for patents were not surrendered or destroyed. This left Exhibits 1, 2, 3, 4 and 5, the only agreements existing between the New York corporation and its stockholders and licensees. They are the only agreements between the plaintiff and its stockholders and

licensees, they have been assigned by the New York corporation to the plaintiff, as hereafter stated.

Exhibit 3, pp. 50, 52.
Risley, pp. 154, 155, 156, 342.
Bement, pp. 227, 247.
Childs, p. 129.
Stevens, pp. 113-114.
Reed, p. 139.

14. All the then licensees, including the defendant, assigned and transferred to the New York corporation their patents, rights under patents and pending applications for patents, by separate written assignments thereof and accepted licenses thereunder from it.

Referee's Report, pp. 63-64.
Arbitrators' Award, pp. 313.
Concessions, pp. 115, 308.
Assignments, pp. 263, 351, 352, 353.
Brinkerhoff, pp. 308, 323, 327.
Bement, p. 264.

15. The harrows manufactured by the defendant and the other licensees were and are claimed to be covered by the plaintiff's patents. The award of stock issued to defendant and the other licensees was in settlement of all controversies and in payment of the patents, rights under patents and pending applications for patents, assigned by them respectively.

Referee's Report, p. 64.
Arbitrators' Award, p. 313, etc.
See preceding Subs. 2 and 3.

16. The following parties manufacturing harrows, are not licensees of the plaintiff: A. B. Farquhar, of York, Pennsylvania; Smith & Tate Co., of

Harrisburg, Pennsylvania; The Clipper Chilled Plow Company, of Elmira, N. Y.; Hebbner & Sons; Peter Wilms, of Holland, Michigan; Turner Manufacturing Company, of Lagrange, Indiana; Whipple, of St. Johns, Michigan, and D. S. Morgan & Company, of Brockport, N. Y. There are a number of harrows on the market besides the float spring tooth harrows, which are manufactured and sold in large quantities in the United States.

Brinkerhoff, pp. 147, 148, 151, 310.
Metcalf, p. 333.

17. By the conditional agreement of September 17, 1890, defendant required that its president, Bement, should be made a member of the Executive Committee of the Board of Directors of the New York corporation by the resignation of one of its members and Bement's election in his place. Moses Hill resigned as a director and member of such committee and Bement was elected in his place on October 8th, 1890. He continued an active director and member of such committee and during the existence of the corporation.

Agreement, p. 337.
Resolutions, p. 308.
Childs' letter to Bement, dated Dec. 8th, 1890, p. 300.
Bement, pp. 232, 233.
Brinkerhoff, p. 92.

18. On July 31st, 1891, the plaintiff was incorporated under the laws of New Jersey. Its certificate of incorporation states "that the objects for which "this company is organized are to manufacture, pur-"chase and sell agricultural implements and machin-"ery and the rights to make and use the same, and

"all the lawful business incidental thereto." None of the incorporators were manufacturers of harrows.

Referee's Report, p. 65.
Certificate, p. 156, etc.

19. Bement was elected a director of the plaintiff and a member of its Executive Committee soon after its incorporation and so continued actively participating in the management until September, 1893. He was again elected a director in 1894, and is still one.

Referee's Report, p. 65.
Childs, p. 125.
Brinkerhoff, p. 92.

20. In September, 1891, the New York corporation sold and transferred to the plaintiff its patents and interest in patents, pending applications for patents, and all moneys, merchandise, licenses, agreements, contracts and property, except $1,000 in cash, for $455,000, in full paid up stock of plaintiff, at par, which was divided among the stockholders of the New York corporation and substituted for the latter's stock as fixed by the arbitrators' award. Bement received, by direction of the defendant, 292 shares of the plaintiff's stock, being the $29,200 mentioned in such award. The New York corporation was soon thereafter dissolved.

Referee's Report, p. 65.
Concession, p. 320.
Resolutions, pp. 349, 354, 355, 356.
Bill of Sale, p. 73.

21. The New York corporation and plaintiff acquired patents from parties who became licensees after the arbitrators' award, and by purchase from others.

They granted licenses for $1.00 royalty on each float spring tooth harrow to all applicants therefor, whose business character and responsibility warranted their so doing, and when not in conflict with other licenses.

Brinkerhoff, pp. 145, 308, 322-323, 326.

22. The words "float spring tooth harrows, float "spring tooth harrow frames and attachments appli- "cable thereto." used in the licenses to defendants and others, were "intended to and did embrace all "harrows having curved spring teeth, excluding only "wheel harrows employing curved teeth where the "frame bars and teeth are supported by the over- "hanging axle-tree on which the wheels are mounted, "of more than thirty inches diameter, being the class "of wheel spring tooth harrows which were manufac- "tured by the defendant at the date of making the "license contracts."

Referee's Report, p. 66.
Brinkerhoff, pp. 107, 108, 144, 145.
Stevens, pp. 112-113.
Childs, pp 117, 118, 119, 123, 125, 126, 127.
Reed, pp. 132, 135, 138-139, 140.
Walker, pp. 142-143.
Coleman, pp. 79, 80, 81.
Metcalf, pp. 328-329.
Strait, pp. 164, 166.
See cuts of Reed's Wheel Harrows, pp. 132, 133, 134.
See cut of Defendant's Wheel Harrow, p. 119.
Childs' Catalogue, 1884.
Olin & Co.'s Wheel Harrow, pp. 123, 125.

(*a*) When the meeting was held in Buffalo, in the summer of 1890, to organize the New York corporation and Board of Directors, Reed, representing his company, and Tuttle, representing G. B. Olin & Co., objected to including in the licenses wheel harrows, as they were both manufacturing wheel spring tooth harrows. The word "float" was inserted in the licenses so as to exclude such wheel harrows as they were then making.

Reed, pp. 132, 135, 139.
Stevens, pp. 112-113.
Brinkerhoff, p. 109.
Childs, p. 128.

(*b*) At a meeting of the directors of the New York corporation in October, 1890, at Buffalo, the matter was brought up and every one conceded that such wheel spring tooth harrows were not float spring tooth harrows within the terms of the licenses agreed upon.

Reed, pp. 132, 135.
Brinkerhoff, pp. 107, 108, 109, 308.
Childs, p. 128.
Bement, pp. 226, 256.

(*c*) In October, 1890, Reed & Co., Olin & Co., The Gale Manufacturing Company, A. W. Stevens & Son, L. C. Lull & Co., Lawrence, Chapin & Co. and defendant were manufacturing wheel spring tooth harrows.

Reed, pp. 132, 135, 139.
Brinkerhoff, pp. 108-109.

(*d*) At the time the form of license was discussed and determined in September and October, 1890, the only wheel spring tooth harrows on the market were

such as described above. The parties and the trade understood the words "float spring tooth harrows" to be any harrow with spring teeth attached, rigidly or adjustably, to a frame and, when in practical operation, the frame shoes or runners thereunder rest on the surface of the ground or come in contact therewith. Bement was present at the October meeting and participated in the discussion.

Stevens, pp. 112, 335.
Childs, pp. 116, 117, 118, 119, 334, 335.
Brinkerhoff, pp. 107, 109.
Reed, pp. 138, 139.
Coleman, pp. 79, 80.
Metcalf, pp. 329, 330.
Walker, pp. 142, 143.
Strait, pp. 164, 166.
See Subd. 22.

(*e.*) Licenses by the New York corporation, or by the plaintiff, have been granted on float spring tooth harrows where the teeth were fastened to the frame, or to some attachment to the frame, rigidly, and were not adjustable, to the following manufacturers, viz: John G. Higgins, of Charleston, Maine; Childs & Jones, D. B. Smith Company, of Utica, N. Y.; Herndeen Manufacturing Company, Hench & Dromgold, D. C. & H. C. Reed Company, of Kalamazoo, Michigan; D. M. Osborne Company, Auburn, N. Y.; Syracuse Chilled Plow Company, of Syracuse, N. Y.; Walker Manufacturing Company, of Moravia, N. Y.; Pitts Agricultural Works, of Buffalo, N. Y.; Gale Manufacturing Company, Albion, Michigan; Buchler & Gibbs Plow Company, of Canton, Ohio, and George Sweet & Company, of Dansville, N. Y.

Brinkerhoff, p. 324.

(*f.*) Licenses have been granted by the New York corporation or by the plaintiff on float spring tooth harrows where the teeth were adjustable, either on the frame or on some stationary portion attached to the frame, to the following manufacturers, viz: Charles H. Childs & Company, Childs & Jones, D. B. Smith Company and the Eureka Mower Company, of Utica, N. Y.; Syracuse Chilled Plow Company, of Syracuse, N. Y.; D. C. & H. C. Reed Company, Taylor & Henry, L. C. Lull & Company, W. S. Lawrence, Williams Manufacturing Company, Lever Spring Tooth Harrow Company, of Kalamazoo, Michigan; D. O. Everest & Company, of Pine Grove, Michigan; Farmers' Friend Manufacturing Company, D. E. McSherry Company, of Dayton, Ohio; E. Bement & Sons, and the North-Molitor Company, of Lansing, Michigan.

Brinkerhoff, p. 324.

(*g.*) When the New York corporation was organized only a few manufacturers made steel frames. The all-steel frame harrow has been in the market for five or six years.

Reed, p. 139.

(*h.*) After such organization Blaker & Son obtained a patent in 1890 for a lever attachment, and began to put float spring tooth harrows on the market, with such attachment. Most of defendant's witnesses did not hear of such harrows until the fall 1892 or spring of 1893.

Brinkerhoff, pp. 105, 110
Childs, pp. 127, 128.
Metcalf, pp. 328, 332.
Reed, p. 139.
Markham, p. 172.

Brown, p. 215.
Bement, pp. 229, 230.
Molitor, p. 265.
Cook, p. 201.
Brown, p. 215.
Newton, p. 277.
Emory, p. 284.
Blaker harrow, Exhibit, p. 110.

On October 13, 1891, it issued licenses to Blaker & Son similar in form to license, Exhibit A, except the following description of the Blaker harrow, contained in the schedule attached to and made a part of the license: "A float spring tooth harrow, sectional "steel frame, angle bars straight in cross section in "line of draught, with non-adjustable teeth and bars "adjustable simultaneously by a lever, and with the "clips, as shown by sample."

Brinkerhoff, p. 105.
Childs, p. 128.
Bement, p. 247, 248.

Blaker & Son, on taking this license, paid to plaintiff a lump sum as royalties for harrows, with such lever attachments made by them prior to assigning their patent and receiving such license, which license is still in force.

Childs, p. 128.
Brinkerhoff, pp. 105, 106, 328.

(*i.*) Up to that time the market was for wood and steel frames, without lever attachments. At the time of the trial, and for the preceding two seasons, about 60 to 90 per cent. of the steel harrows had lever attachments.

Reed, p. 139.
Childs, p. 125.
Babcock, p. 175.

(23.) At the annual meeting of the plaintiff on September 13th, 1892, and the meeting of its Board of Directors on that day, the licensees and directors considered the licenses in reference to the manufacture of these harrows with lever attachments. D. M. Osborne & Co., who were not licensees of plaintiff, were manufacturing such harrows. Bement was present and participated in the proceedings of both meetings. Childs, Deuel and Bement were appointed a committee, to whom the matter was referred. Deuel was the counsel for the plaintiff, and is an able patent lawyer. He stated his views on the subject at the annual meeting, and the committee reported. On Bement's motion a resolution was adopted at this annual meeting, in substance as follows: That plaintiff license all those that have licenses to build harrows with *lever attachments*, on these conditions:

First. That a member of the board of directors of plaintiff, by a majority vote thereof, be added to act with the executive committee in passing upon the harrows submitted to it, for which a license was desired.

Second. That a full sized working harrow, for which a license was desired, should be submitted to the committee, and if it appeared to such committee that the harrow did not infringe upon the rights of the other licensees of the plaintiff, that then it was empowered to issue such license.

Third. The plaintiff to have full charge and control of the defence of all suits brought against its licensees arising from the granting of such licenses.

Fourth. The committee to meet on November 1st, 1892, at Auburn, N. Y., and pass upon any applications then on file, if accompanied by a sample of a

full size working harrow. If any licensee should not then be ready to submit such sample, then the committee to meet at such licensee's request, on thirty days' notice, at the call of the president, and to pass upon such application ; any party to whom such license should be granted to assign to the plaintiff all patents, applications, licenses, or other rights they might hold, obtain or control in reference to harrows coming within the scope of such license. Royalties on lever harrows to be the same as required to be paid under then existing licenses on other styles of harrows, and payable at the same time and in the same manner ; each licensee or applicant for a license to produce with his application the file wrapper contents of any patent, also abstract of title to such patents, which were to be assigned under such resolution, also copies of all drawings and specifications of pending cases. Before its passage the resolution was considered and reported upon by a committee, of which Bement was a member.

Brinkerhoff, pp. 92-94, 310-311.
Childs, pp. 119-120, 128.
Reed, p. 135.
Stevens, p. 113.
Metcalf, pp. 328-329, 332.

On October 18th, 1892, the board of directors, upon the motion of Mr. Reed, seconded by Mr. Bement, amended this resolution by striking out the clause therein requiring the licensees to give a bond.

Brinkerhoff, pp. 94, 312.

(*a*) The executive committee met in Auburn on November 1st, 1892, all the different licensees having been notified in advance of such meeting. Defendant and most of the other applicants for licenses for harrows, with lever attachments, submitted their

samples. The D. B. Smith Company had been sued for making harrows with lever attachments, and an injunction had been obtained against them. Smith appeared and urged that the suit should be discontinued. Lawrence, Chapin & Co. had been sued to restrain them from manufacturing or marketing a harrow with lever attachments. Both of these companies were under licenses like Exhibits "A" and "B." On motion of Bement, the change in license was referred to Stevens, Childs and Brinkerhoff. Bement wanted a license for the defendant and for the North-Molitor Manufacturing Company. On his motion, other resolutions were passed in reference to the issue of licenses for such harrows, and also to the granting of licenses to D B. Smith Company, Childs & Jones, defendant, and North-Molitor Co.

Stevens, p. 113.
Childs, pp. 120-121.
Brinkerhoff, pp. 106, 310-312.
Reed, pp. 132, 135.
Bement, pp. 229, 230, 248-250, 264.

(*b.*) On October 18th, 1892, at a special meeting held in Buffalo, the plaintiff's board of directors, upon Bement's motion, seconded by Reed, apppointed Brinkerhoff and Childs to confer with D. M. Osborne & Company as to taking licenses from the plaintiff. The executive committee, when in Auburn on November 3d, 1892, received the verbal report of Brinkerhoff and Childs, and accepted it by a unanimous vote. Bement was present, and went with Childs to D. M Osborne & Co.'s to arrange the contract which was afterwards signed, and participated in all the negotiations preceding it. After their report was made to the executive committee, Stevens and Reed were added, when further details came up in reference

to the contract. It was suggested that a committee of the several parties interested canvass the points under consideration at that time, and Bement was one of the members. The substance of the matter in the contract was agreed upon with D. M. Osborne & Co., and it was left with Deuel, the attorney for Underwood & Stork and Mr. Storrow, of Boston, representing D. M. Osborne & Co., to put it into written form. Mr. Storrow is one of the most prominent patent lawyers in the United States. The contract was executed and delivered on February 17th, 1893. The contract included a license to manufacture and sell harrows, with lever attachments, under the description "float spring tooth harrows."

See Contract submitted, Ex. , not printed, but submitted under stipulation.
Brinkerhoff, pp. 148-150.
Childs, pp. 131, 132.
Osborne, p. 177.
Bement, pp. 230, 250.

Shortly afterwards D. M. Osborne & Co. gave notice of its revocation. This was the situation at the time of the anuual meeting on September 12th, 1893. Under a resolution adopted at that meeting Messrs. Childs, Lawrence, Stuart, Brinkerhoff and Stevens were appointed a committee to report on the matter, and did report on the following day. Their report was referred to the Executive Committee with power to act. At a meeting of the Board of Directors, on December 14th, 1893, that committee reported that on December 5th, 1893, it had effected an adjustment with D. M. Osborne & Co., by which the latter paid $1,000, and entered into a contract to pay a royalty of $3,000 for the ensuing year and for four years

thereafter, unless the contract should be revoked by a notice given in the month of August, 1894. This contract was submitted, and the report of the committee accepted and the committee was discharged by a resolution then passed.

Brinkerhoff, p. 150.

There were a large number of infringement suits for using or handling the Osborne harrow pending, when the first contract was negotiated. The prices and terms finally fixed by the Osborne contract were the same as those fixed under licenses for like harrows.

Brinkerhoff, p. 150.
Metcalf, pp. 332, 333.

(*c.*) The litigation with D. M. Osborne & Co. for the manufacturing of such harrows was settled by this contract.

Metcalf, p. 332.

Lawrence, Chapin & Company and D. B. Smith Company were each licensees of the plaintiff under licenses like A, when sued, and each settled with the plaintiff and accepted a license for lever attachments in the fall of 1892.

Brinkerhoff, p. 106.

(*d.*) Under the resolution, and by direction of the executive committee, on motion of Bement, licenses were voted or granted by the plaintiff for lever float spring tooth harrows, where the teeth were bolted rigidly to the bar, or some portion of the harrow, to the following parties: D. B. Smith Company, Childs & Jones, of Utica, N. Y.; D. M. Osborne & Company, of Auburn, N. Y.; Pitts Agricultural Works, of Buffalo, N. Y.; Reed & Company, of Kal-

amazoo, Michigan ; Gale Manufacturing Company, of Albion, Michigan ; Buchler & Gibbs Company, of Canton, Ohio ; Hench & Dromgold ; E. Bement & Sons and the North-Molitor Manufacturing Company, of Lansing, Michigan.

Brinkerhoff, pp. 104, 324.

(*e.*) Under such resolution and by like direction of the executive committee, licenses were granted by the plaintiff for lever float spring tooth harrows, where the teeth were made independently adjustable to some part of the frame to which they are attached, to the following parties, viz :

Childs & Jones, C. H. Childs & Company, D. B. Smith Company, Eureka Mower Company, of Utica, N. Y.; Syracuse Chilled Plow Company, of Syracuse, N. Y.; Stevens & Son, Auburn, N. Y.; Pitts Agricultural Works, of Buffalo, N. Y.; Blake & Blake, of Racine, Wisconsin ; D. C. & H. C. Reed & Company, L. C. Lull & Company, W. S. Lawrence ; Lever Spring Tooth Harrow Company, Taylor & Henry, D. O. Everest, Buchler & Gibbs Plow Company and the Gale Manufacturing Company.

Brinkerhoff, pp. 324, 325.
Childs, p. 121.

(*f*). The licenses for harrows with lever attachment, granted as hereinbefore stated, were accepted by all of such licensees except the defendant and the North-Molitor Company, and are still in force.

Brinkerhoff, pp. 104, 325.

24. The licenses for float spring tooth harrows and such harrows with lever attachment are substantially the same in form, except that the word "lever" is inserted in the latter and the prices thereunder are

different. In each license there is a description of the harrow, duplicates of which the licensee is licensed to make. On Bement's motion, the Executive Committee appointed a committee to superintend the form of the latter licenses, and such committee approved the form and changes therein. There was a difference in the prices between harrows with and those without lever attachment. The prices were fixed by resolution of the Board of the New York corporation when the first form was adopted, and the Executive Committee when at Auburn fixed the prices for harrows with lever attachment. The licenses and prices to all licensees under each form of license are alike, except that one issued to Osborne & Co. provides for the payment of a lump sum instead of $1.00 royalty, as already stated.

Brinkerhoff, pp. 94, 96, 109, 110, 146, 150, 151.
Stevens, p. 114.
Childs, p. 128.
License Contract, Ex. 23, pp. 96, 101.

25. The terms and manner of selling were modified on Bement's motion, on October 18th, 1892. The prices have not remained the same, but were reduced by the Board of Directors, at the request of the licensees. At the annual meeting in 1894 there was a general reduction of prices of such harrows without lever attachment.

Brinkerhoff, pp. 146, 150, 151.
Babcock, p. 175.
Exhibit 48.

All the licensees have agreed thereto except the defendant and the North-Molitor Company. These two companies were notified of the reduction and re-

quested to sign the reduced scale of prices, which they have not done.

Brinkerhoff, pp. 150, 151.

26. All the licensees have complied with the provisions of their licenses except the defendant, the North-Molitor Company, and Hench & Dromgold. The only parties that defendant attempted to prove had violated their licenses were the Standard Harrow Company and Osborne & Company. It failed to prove any such violations by either, and established the fact that both had duly performed their license agreement. Plaintiff has secured an injunction against the violation of their license by Hench & Dromgold.

Babcock, pp. 173, 175.
Concession, p. 177.
Offer of Plaintiff's Counsel, p. 174.
Exhibit 141, 346, 347.

The plaintiff did not know of the violations by the defendant or the North-Molitor Company.

Brinkerhoff, p. 326.

27. Dividends have been received on the stock of the New York corporation and plaintiff, held by Bement for the defendant. These dividends were paid in the years 1891, 1892 and 1893—two in cash and the other credited on the amount due for royalties from the defendant.

Childs, p. 77.
Bement, p. 254.

28. The defendant and its dummy corporation, the North-Molitor Company, never executed the license for harrows with lever attachment, samples of which had been submitted, as

stated in Subdivision 23 (*a*). The licenses and assignments of patents and pending applications were sent soon after the meeting at which the licenses were voted and were received by the defendant. It promised to execute them and claimed that the assignments had been mislaid. Duplicates were sent in December, 1893, with copies of the resolutions adopted on the subject of such licenses.

Brinkerhoff, pp. 101, 102, 104.
Bement, p. 230.
Letter to defendant, p. 102.
Letter from defendant, p. 102.
Letters to defendant, pp. 103–104.

Defendant did not give any notice to the plaintiff that it would not execute the papers other than simply not executing them. It never executed the assignment of its patents and applications for patents which should have been done if the license had been accepted.

Brinkerhoff, p. 104.
Bement, p. 261.

The only license for harrows with lever attachment voted to defendant was one with the teeth fastened rigidly to the bar. It never has had any license for curved teeth adjustably attached to the frame with reenforcing springs attached to the frame and bearing on the teeth to re-enforce their strength.

Brinkerhoff, pp. 101, 326.
Childs, pp. 120, 121.
Bement, pp. 250, 252.
Harrow, submitted for license, in evidence, pp. 95, 96.

Its "Ajax" has adjustable teeth.

Brinkerhoff, pp. 101, 102, 326.
Reed, p. 137.
Coleman, p. 79.
Ajax harrow in evidence, p. 79.

29. The defendant made its last monthly report September 8, 1893.

See report, p. 75.

It received the last license labels from plaintiff March 17, 1894.

Childs, p. 76.

Since March 2, 1893, the defendant has received only 250 labels.

Childs, p. 76.

It has sold since January 1, 1894, 896 licensed harrows.

Bement, p. 281.

All labels prior to March 1, 1891, were 5 cents each. The defendant paid $200 for 4,000 labels, and it also paid $775 for labels at 10 cents each, which paid for 7,750 labels, making 11,750 labels in all.

Childs, pp. 76, 77

The defendant reported and paid royalties on 13,900 harrows prior to September 1, 1893.

Childs, p. 77.

The defendant sold to January 1, 1895, 14,960 licensed harrows.

Bement, p. 281.

This shows a sale of 3,210 more licensed harrows than defendant had received labels for. The total

sales of licensed harrows in excess of those reported and paid for is 960. There could have been no labels on these.

Referee's Report, p. 66.

The defendant ceased reporting harrows sold for the alleged reason "the company had been bought "up by an outside harrow company."

Bement, p. 254.

Bement voted with the plaintiff and other directors to grant permission to Mr. Risley to "buy up the "licenses."

Risley, p. 338.
See contract, pp. 339, 340.

The defendant gave Mr. Risley an option to purchase its harrow licenses and harrow business and granted several extensions of such option. It received $500 for granting one of the extensions.

Risley, pp. 340–342.

The defendant abandoned the license contract in September, 1893, and since that time "has paid no "attention whatever to the license contracts or done "anything to recognize them in any way."

Bement, p. 254.

Defendant sold without plaintiff's knowledge spring tooth harrows which it was not licensed to sell—cuts of which are shown in defendant's catalogue at pp. 87–88 thereof. These are known as the "Ajax," "Reliance" and "Lansing."

Bement, pp. 250, 251, 252, 253.
Brinkerhoff, p. 326.
See Point Nineteenth.

The defendant admitted in its answer, which was put in evidence, that it had not made monthly reports since August, 1893.

Answer, p. 140.

It admitted that it kept books in which it entered harrow sales and that it refused to allow plaintiff's agent to inspect its books during business hours.

Answer, p. 138.

It admitted that the defendant refused to attach license labels to harrows sold.

Answer, p. 140.

It admitted that the defendant sold and had on hand for sale and intended to sell harrows not licensed.

Answer, p. 140.

It admitted that it is now selling harrows not licensed.

Answer, p. 140.

It admitted that it had on hand harrows not duplicates of those left with the plaintiff which are not covered by licenses A and B, and had manufactured and sold some unlicensed harrows.

Answer, p. 141.

It admitted that its traveling salesman sold licensed harrows under price.

Answer, p. 141.

The defendants sold the following unlicensed Spring Tooth harrows:

Reliance, 6.
Ajax, 2,849.
Lansing, 382.
Bement, pp. 281, 282.
Referee's Report, p. 66.

The defendant paid little or no attention to the license contracts or to the price at which the same were sold.

Bement, pp. 234, 254, 251, 275, 276, 282, 292.
Molitor, pp. 268, 269, 290, 291.
Bartholomew, pp. 290, 291.
Coleman, pp. 77, 79.
Ellis, pp. 81, 83.
Bailey, pp. 84, 86.
Waite, pp. 87, 90.
Stevens, p. 335.
Brinkerhoff, pp. 322, 326.
Childs, pp. 130, 334.
Bement Resolution, pp. 214, 325.
Cookinham, pp. 151, 153.
Cook, p. 198.
Brown, p. 211.

The defendant and its officers and trustees organized under the name of the North-Molitor Manufacturing company, a dummy corporation for the purpose of aiding its sales of goods. This dummy corporation has no office or manufactory. The defendant corporation has manufactured and furnished to it a large number Black Diamond Lever Harrows which were not licensed.

Bement, pp. 255, 254-275.
Bartholomew, pp. 290, 291.

THE CONTRACT.

A brief statement of what the contract contains with some citations of authority, will serve, we think,

to show the entire reasonableness of the contract and its freedom from any just ground for criticism and in this regard the essential terms of the two contracts are the same.

The contract in its duration is limited to the life of one or more of the plaintiff's patents as "applicable "to, and embracing the peculiar construction em- "ployed by E. Bement & Sons during the term of "such patent or patents."

They licensed the defendant to "manufacture float "spring tooth harrows, float spring tooth harrow "frames without teeth and attachments applicable "thereto, a sample of which harrows, harrow frames "and attachments were at the date of the license, "in possession of the New York corporation, and "marked and numbered as set forth in schedule "'A' made a part of the license" pp. 7, 8, 11, 14, 16.

The license contract "B" is confined to a territory lying south and west of Virginia, West Virginia and Pennsylvania.

Fowler v. Park, 131 U. S., 88.
American Paper Barrel Co. v. Laraway, 28 Fed. Rep., 141.

The defendant claimed in his printed brief that the patents which the defendant assigned to the plaintiff's assignor covered the harrows which the defendant was manufacturing; it cannot, therefore, be pretended that the licensed harrows were not covered by the plaintiff's patents.

In the recital in the statement that the defendant desired to acquire the right to manufacture and sell harrows, etc., under patents and patented rights then

owned or thereafter acquired by the New York corporation which applied to and embraced such constructions, patents and reissues and for licences thereunder. The agreement that these licenses shall continue during the term of subsequently acquired patent rights, while such an agreement is valid, that condition does not exist in this case.

Hulse v. Bonsack M. Co., 65 Fed. Rep., 864, 869, 870.

It was practically impossible for any patents granted after the date of such licenses to apply to the defendant's construction. It might, however, desire to use other improvements covered by plaintiff's patents. The licensees provided for the right to use any other patents that the New York corporation should acquire and also created the necessity for acquiring such patents which might be found of advantage to licensees.

Bonsack M. Co. v. Smith, 70 Fed. Rep., 383, 386, 387.

The life of a patent is conceded to be seventeen years. The length of its life cannot be extended by re-issue; a re-issue can only be made to correct errors, and when the re-issue is granted it is for the unexpired term of the original patent and the re-issue cannot be enlarged in its scope. If it is enlarged it is void. It is apparent, therefore, that the term of the license is only for a limited number of years, depending on the life of the patent or patents, which apply to the defendant's licensed harrows. This was a reasonable and proper exercise of contract rights, the contract being based in all of its provisions exactly upon the rights owned by the plaintiff and were not in one instance enlarged.

There is no finding by the referee that any of the patents under which the licenses were granted were invalid. It was found by the referee that the patents were claimed to cover the defendant's construction.

Both the licensor and the licensee had then existing conflicting rights which the contracts settled. The settlement was good.

Marsden v. Sweet, 66 N. Y., 206.

The first clause and the first paragraph of the second clause of the license provided for the payment of a royalty of one dollar for the use of the plaintiff's patents on each harrow. The reasonableness of this royalty has not been questioned. It provided for the making of reports, keeping books, etc., necessities for ascertaining the amount of royalties to be paid.

In the remainder of the first clause and the second clause of the license, it was agreed that the licensee should not sell harrows or harrow frames "to any "person, firm or corporation to be sold on commis- "sion, or allow any rebate or deduction from the "price or prices fixed in this license except to settle "with an insolvent debtor for harrows or harrow "frames or attachments applicable thereto previously "sold or delivered."

This clause was for the benefit of the licensor and the licensee equally; to permit the licensee to ship his goods to all parts of the country to be sold on commission is a vicious system of business; neither party would know the extent of their sales, and aside from this, sales made by jobbing agents can never be controlled and the entire market would become demoralized and the business ruined. This clause was a matter of self-protection to both.

By the third clause, the defendant agreed not to sell "at a less price or on more favorable terms of "payment and delivery to purchasers, than is set "forth in schedule A, made a part of this license ex- "cept as hereinafter provided."

This clause was legal and valid. The New York corporation owned the patents. It had a right to impose any terms it saw fit to those who used its patents. The whole question was strictly in the domain of contract.

Fowle v. Park, 131 U. S., 88.
Duber Watch Case M. Co. v. E. Howard W. & C. Co., 66 Fed. Rep., 637.
Central Shade Roller Co. v. Cushman, 143 Mass., 353, 354.
Gloucester I. & G. Co. v. Russia Cement Co., 154 Mass., 92.
Dolph v. Troy Laundry M. Co., 28 Fed. Rep., 553.
In re Green, 52 Fed. Rep., 104, 115.

It was for the interest of both the licensor and the licensee that uniform prices of all licenses should be maintained. If the market was demoralized, by the cutting of prices, there would be no profit in the business for the manufacturer and no royalties for the licensor. This clause of the agreement rests in the very nature of the patent.

The owner of a valid patent secured under the constitution and the laws of the United States, has three exclusive rights: first, the right to manufacture; second, the right to sell; and third, the right to use, and any one who invades either of these rights is an infringer.

The fourth clause reserves the right to the licensor to "decrease the selling price and make the terms of "payment and delivery more favorable to the pur- "chaser, and reduce the royalty" on licensed harrows, etc.

The licensor has no power to raise the selling price nor the amount of royalty to be paid, nor to make the terms of payment or delivery of harrows or harrow frames less favorable to purchasers. This was a reasonable and proper restraint on the licensor and was advantageous to the licensee.

The provision for labels and the use thereof was a mere matter of detail and was a necessary and proper provision for the protection of the public and every party in interest. The use of such labels is customary where goods are manufactured under patents, and the Federal Statute requires the article to be stamped with the word "patented" and the date of such patent. This clause is also inserted to furnish information to the licensor of the number of labels purchased by the licensee and to determine the number of such sales.

In the sixth clause it was agreed that "the licensees "will not during the continuance of this license, be "directly or indirectly engaged in manufacturing any "other float spring tooth harrow, or float spring "tooth harrow frame without teeth or attachments "applicable thereto than those which it is licensed "to manufacture and market under the terms of this "license, except such as it may manufacture and "furnish another licensee of the National Harrow "Harrow Company, and then only such construction "thereof as such other licensee shall be licensed by

"the National Harrow Company to manufacture and "sell, except such other styles as it may be licensed "to manufacture and sell by the National Harrow "Company."

This was a reasonable provision. Without such a provision, the licensor's business might be ruined by a dishonest licensee changing his construction of harrow to interfere with other licensees, and, by putting such altered harrows upon the market in defiance of the license contract, inflict irreparable injury on other rights. This case is an illustration of the dishonest schemes of licensees to beat the licensor and still obtain all the benefits of his patents. This clause placed no restriction on the defendant who was left free to manufacture or sell spike or peg tooth harrows, disk harrows, riding harrows, or indeed any other kind of harrow, "other than float spring tooth "harrows." It was not only a reasonable, but a lawful and necessary limitation on the licensee resting in the domain of contract.

Bowling v. Taylor, 40 Fed. Rep., 404.
Billings v. Ames, 32 Mo., 265.
Jones v. Lees, 1 Hurlston & Norman's Rep., 186.

This limitation did not stifle invention as contended by the defendant in the Appellate Division. The Federal Statute requires the inventor to make application for United States letters patent. A corporation cannot file an application for a patent, it cannot make an invention, the invention must be made by an intelligent mind and the owner of that intelligent mind who makes an invention is the only person that can make an application for United States letters patent.

The licensees stipulated that "during the term of "this license, it will not directly or indirectly in any "way deny or contest the validity of any of the "patents applicable to and embracing the construc- "tion which it is licensed to manufacture, or that it "may manufacture for another licensee which said "licensee is licensed to manufacture and sell, or the "re-issue thereof, or the sufficiency of the specifica- "tions thereof, or the validity of the title to such let- "ters patent or re-issue, or the right of the National "Harrow to make licenses to others, and no act of "either party shall invalidate this admission."

This is the usual stipulation in licenses, and indeed imposes no more obligation than the law places upon a licensee, who by virtue of his license is not permitted by law to do any of the acts which are embraced in this clause.

The licensor in the ninth clause agrees that "after "such license becomes operative, it will not license "any other person or party to manufacture and sell "any float spring tooth harrows, float spring tooth "harrow frames without teeth or attachments ap- "plicable thereto of the *peculiar style and construc-* "*tion* or embodying the peculiar features thereof" used by the licensee as illustrated and embodied in the sample harrows, then in the possession of the treasurer of the licensor, and referred to in schedule A which is made a part of the licenses.

This was not only a proper restraint on the licensor, as it would be manifestly unfair to license another manufacturer to use a duplicate or such near imitation of the licensee's goods as was calculated to deceive or injure the licensee's trade.

The latter part of the eighth clause and the tenth clause, when read in connection with the licenses and the ninth and other clauses are as follows: "The licen- "see will not alter or change the construction of the float "spring tooth harrow, float spring tooth harrow frames "frames without teeth or attachments applicable there- "to, from that construction appearing in the sam- "ples in the possession of the treasurer of the licensor, "and mentioned in schedule A; and will not manu- "facture or sell or procure to be manufactured or "used directly or indirectly any other or different "styles thereof, except such as it may supply to other "licensees who are licensed to manufacture and sell "the same."

This clause was reasonable and just, and indeed it is the very necessity for a licensor to prevent the licensee from doing irreparable injury to other licensees by adopting and making improvements previously adopted by other licensees. It is a very common provision in a license contract, and up to this case, has never been considered as interfering with any public rights.

The eleventh clause reserved to the licensor the option to treat any departure from the terms of the contract as a breach thereof and the licensee as an infringer, and to restrain the purchase thereof by suit and injunction, the licensee waiving the right of trial by jury, which remedy is provided by the seventh clause.

This and the next clause shows that the licenses are continuing contracts for the full term of the life of the patent or patents used by the defendant, notwithstanding any violation thereof by the licensee, unless

the licensor should elect to terminate them for breaches thereof by the licensee.

The exercise by the licensor of the right to terminate would always be under the control of the court, and must be a reasonable exercise of a power reserved and could not be arbitrarily used. This clause was reasonable and proper.

The twelfth clause provided that the licensor should not be released from the payment of royalties and liquidated damages for harrow and harrow frames manufactured or sold up to the time of such termination in the event of a breach of the contract by the licensee and stipulated that such rights of action would become immediately due and payable.

This clause was reasonable and just in its provisions. Such clauses are in daily use in a great variety of contracts.

In the thirteenth clause the licensor is under obligation to defend any suit for an alleged infringement of the licensed articles manufactured and sold, and to pay the costs or damages recovered therein, provided it received notice of the suit and is allowed to appear and conduct the defense. There does not seem to be anything unfair or illegal in this agreement.

It was further stipulated that no royalties should be paid on goods exported for use in a foreign country.

Without this clause the manufacturer would be required to pay royalty on goods not intended for use in this country. This clause was wholly beneficial to the licensee.

The fifteenth clause made the license non-assigna-

ble except to a successor of the licensee in the same place in business, without the written consent of the licensor.

This was a reasonable provision to prevent abuse and to prevent the licenses from getting into the hands of irresponsible parties.

The royalties and liquidated damages shall not cease to be paid under any circumstances whatever except under the conditions named in the licenses during the continuance thereof.

This clause was reasonable and was equivalent to saying that as long as the licensee used the patents and continued the business during the lifetime of the patents he should continue to pay royalties unless the licensor terminates the same for breaches committed by the licensee. The license was limited to "float "spring tooth harrows, float spring tooth harrow "frames without teeth and attachments applicable "thereto." What constituted a float harrow was established by the proof and found by the referee.

In the seventeenth clause it was stipulated that the place of performance of the contracts should be in the City of Utica, N. Y., and that the same "should "be construed and the rights of the parties thereun- "der determined according to the laws of the State "of New York."

It was reasonable to stipulate the place of performance of the contract. It was equally competent for the parties to stipulate the laws by which the validity of the contract was to be measured and decided as one of the parties was a New York corporation and the other a Michigan corporation. The con-

tracts were executed in New York. These provisions were reasonable and were proper and judicious for the protection of the rights of both parties. The place where a contract is made or where it is to be performed controls.

We submit that the contracts under the most careful scrutiny are reasonable and legal in all of their provisions and are in accord with the findings of the referee.

WHAT THE REFEREE DECIDED.

The Referee on the evidence found:—

First: That the contracts in dispute including those contracts set out in the complaint constituted "an absolute sale by the defendant (plaintiff in error) "to the National Harrow Company of New York of "the U. S. Letters Patent and licenses under the U. "S. Letters Patent . . were founded upon a good, "valuable and adequate consideration moving be- "tween the parties."

Rec. p. 64.

Second: That the sales by the plaintiff in error of its patents and rights under the U. S. Letters Patent, including the contracts attached to the complaint "were intended to and did settle existing controver- "sies with reference to the rights of the National "Harrow Company of New York and the defendant "(plaintiff in error)".

Rec. pp. 64 and 65.

Third : He further decided that the contracts attached to the complaint "were and are good and valid "contracts founded on adequate considerations and "were reasonable in their terms . . imposing no "restraints upon the defendant (plaintiff in error) be- "yond those which the parties had a right from the "nature of the transactions to impose and accept."

Rec. p. 65.

Fourth: He further found that both parties for a period of time performed the stipulations contained in the contracts and that the plaintiff (defendant in error) had performed all of the stipulations and agreements to be performed on its part and was ready, able and willing to perform the requirements of the contracts.

That the defendant (plaintiff in error) after receiving and retaining its full consideration, refused to perform its part of the contracts and without cause or reason abandoned the further performance of the contracts and still retained the price it had received. The Court assessed the damages which had been stipulated in the contracts to be paid for the violation of the terms of the agreements.

Rec pp. 66-67.

Fifth: He further found that all of the contracts in evidence were "legal, valid and binding contracts ". . and that they embraced no illegal restraint "and are not repugnant to any rule of public policy, "as tending to create any trust or any other illegal "combination . . and were intended to be con- "tinuing contracts."

Rec. p. 67.

No federal question was suggested or raised during the progress of the trial of the case before the Referee.

The decision of the case turned upon the question as to whether the contracts in suit were in common law restraint of trade. The trial Court held that they were not.

No motion to dismiss at the end of the plaintiff's proof nor at the close of the evidence was made which raised any federal question.

No federal question was decided at any time by the trial Court.

WHAT THE APPELLATE COURT DECIDED.

The Appellate Court decided that no errors of law were committed by the trial Court in receiving, rejecting or in any ruling made during the progress of the case.

This statement is contained in the order and judgment of the reversal.

Rec. pp. 403-404.

The order and judgment of reversal of the Appellate Court did not reverse the judgment on questions of facts.

On the stipulation entered into between the parties after the case had been argued in the Appellate

Division and before it had been decided, it was agreed that the eight questions heretofore quoted were the only questions which the Appellate Court had the right to consider.

All of those questions (except the 8th) were questions of fact and not of law.

There were no exceptions in the record which justified the Appellate Court in reversing the judgment on questions of law. It so held and is so stated in the order of reversal.

If we are permitted to look into the opinion of the Court to determine upon what question of law the Appellate Court reversed the judgment, it at once appears that the reversal of the judgmet in the minds of the Appellate Court as stated in its opinion was reversed on questions of facts.

The learned judge who delivered the opinion of the majority of the Court stated that they were "of the "opinion that the contracts sought to be enforced are "void as against public policy, because by them it is "sought to control for a long period of years during "the life of the patents the float spring tooth harrows, "and to limit during the same period manufacturers' "licenses by the plaintiff (defendant in error) and by "its predecessor to the production of float spring "tooth harrows described in the licenses and because "the effect of the contracts is to prevent further im-"provements in harrows by the licensee of the plain-"tiff" (defendant in error).

Rec. p. 401.

WHAT THE NEW YORK COURT OF APPEALS DECIDED.

The New York Court of Appeals reversed the judgment of the Appellate Court and affirmed the judgment of the trial court.

The appellant in the Court of Appeals contended that the undisputed evidence in the record show that the various agreements entered into at or about the time the contracts in dispute were made, including the contracts in dispute, constituted undisputed evidence of a combination in restraint of trade, and was therefore void. No federal question was raised in the record or discussed in the opinion of the Court of Appeals in reference to any federal question, so far as the record discloses.

The Court of Appeals held and decided that under the statute and constitution of the State of New York it was deprived of the power to consider any question of fact in that Court and that the record showed no question of law for review.

The Court in deciding this case says :

"In very many cases the Court has been invited "to review judgments where it was apparent that a "mistake had been made in the Order of Reversal, "but it has steadfastly adhered to the command of "the statute and refused to sustain the judgment un- "less it appeared that there was an error of law "upon which the General Term or the Appellate Di- "vision, as the case might be, could have rested its "reversal. Among these cases may be found the "following : Weyer v. Beach (79 N. Y., 409) ; "Davis v. Leopold (87 N. Y., 620) ; Hannigan v. "Allen (127 N. Y., 639) ; Furner v. Seabury (135 N.

"Y., 50); Mack v. Colleran (136 N. Y., 617); Rien-
"deau v. Bullock (147 N. Y., 269); Bomeisler v.
"Forster (154 N. Y., 229); Snyder v. Seaman (157
"N. Y., 449); Petrie v. Hamilton College (158 N.
"Y., 458); People v. Adirondack Ry. Co. (160 N.Y.,
"225) Gannon v. McGuire (160 N. Y., 476); Lan-
"non v. Lynch (160 N. Y., 483); Spellman v.
"Looschen (162 N. Y., 268); Shotwell v. Dixon
"163 N. Y., 43)."

This case in the New York Court of Appeals turned wholly on the interpretation of Section 1338 of the Code of Civil Procedure and upon Article VI, Section 9 of the New York State Constitution of 1895 referred to in point on motion to dismiss.

No federal question was before the New York Court of Appeals for its decision, and its decision affected no federal question.

By examining Section 1338 of the New York Code of Civil Procedure and Article VI, Section 9 of the New York State Constitution, both prohibit the Court from passing on any questions except questions of law, and questions of law having been stipulated by the agreement of the parties out of the record there was nothing upon which the judgment of the Appellate Division rested, and the Court of Appeals were compelled to reverse the judgment.

National Harrow Co. v. E. Bement & Sons. (163 N. Y. 505.)

POINT I.

The fact that the contracts in dispute related to United States Letters Patent, does not raise a federal question.

Hartell v. Tilgham, 99 U. S., 547.
Dale v. Hyatt, 125 U. S., 46, 54.

Where two or more questions are raised by answer in a case, and one of the questions being a common law question and the other a federal question and the case is decided on the common law ground, which does not include the federal question, a writ of error to review a judgment of the highest court of the state will not lie.

Gibson v. Chouteau, 8 Wall., 314, 318.
Klinger v. State of Mo., 13 Wall., 257, 263.

In determining whether or not a federal question was raised or decided, this court will not examine or resort to the opinion of the Court to determine this question, nor will it take the assertions of counsel. The record must affirmatively show that a federal question was distinctly raised and decided adverse to the plaintiff in error to justify this Court in reviewing the record.

Gibson v. Chouteau, 8 Wall., 314-318.

A claim growing out of a sale or contracts relating to United States Letters Patent does not present a federal question capable of review in this Court.

Wade v. Lawder, 165 U. S., 624.

A Federal question incidentally plead in an answer setting up other and distinct grounds of defense, where the Federal question was not otherwise raised in the trial Court or on appeal and where the decision upon

its face proceeded upon common law grounds not affecting any Federal right, this court is without jurisdiction to review the judgment of the State Court on a writ of error.

Bacon v. Texas, 163 U. S., 207.
Missouri V. R. R. Co. v. Fitzgerald, 160 U. S., 556.
Chemical National Bank v. City Bank, 160 U. S., 646.

The assignment of error cannot be used to import into the case a Federal question where the record shows that no Federal question was considered or decided by the State Court.

Cornell v. Green, 163 U. S., 75.

The facts and the decision of the referee were amply broad to have justified him in holding and deciding that the contracts were valid and that they were not in common law restraint of trade.

There is no finding in the record which would justify this court in holding that any Federal question was properly raised at any stage of the case in the State Courts.

The record shows ample facts to justify the judgment in the State Courts.

Egan v Hart, 165 U. S., 188.

This case holds that where the findings of the court do not show a Federal question, that it is not the province of this court to find facts which would raise a Federal question, but that the findings of the trial Court were conclusive in this court.

POINT II.

The Sherman-inter-state commerce act has no reference to anything appearing in the record which is sought to be reviewed by the writ of error in this case.

The power of Congress to regulate, under the constitution, commerce between the States is an exclusive power delegated to the Federal Government, whose right is exclusive.

Gibson v. Ogden, 9 Wheat. 1.

This Court has decided that where no regulation by Congress, touching inter-state commerce exists, then necessarily commerce between the States is free.

The power of Congress to establish by legislation, regulations, effecting commerce between the States is confined strictly to commerce which begins in one state and terminates in another.

The Sherman anti-trust law, so called, by its expressed terms, is limited to contracts which affect commerce between the States and between foreign nations.

This Court held in the Trans-Mississippi freight case, arising out of agreements made between Trunk Line railroads with reference to freight rates that the statute applied equally to contracts which had prior to the act been held to be reasonable, as well as to contracts, which under the law, would be held illegal, so that a question of whether a given contract effecting inter-state commerce is legal or illegal when measured by common law rules effecting restraint of trade, are both equally condemned under the provisions of this act.

The act of Congress, declares "every contract, "combination in the form of a trust or otherwise, or "conspiracy in restraint of trade or commerce "among the several States" to be "illegal."

Chap. 647, Laws of 1890, Sec. 1.

This statute provides three distinct remedies for violations of the provisions of Section 1 of the act:

First: It prescribes a criminal penalty for a violation of the law.

Second: It provides a civil remedy in the Circuit Court of the United States in equity in a suit brought by the local United States Attorney by and with the advice and consent of the Attorney General of the United States the statute grants ample equitable power in such a suit to restrain by injunction (Sec. 4).

Third: The act gives to the party aggrieved, a civil remedy in any Circuit Court of the United States without reference to the amount involved and such an action is triable by jury and the plaintiff is authorized to recover and include his attorney's costs and the Court is required to thribble the damages (Sec. 7).

This statute created a new right of action with reference to inter-state commerce and specifically provided remedies for violations of the statute.

It is a familiar rule of interpretation of statutes that where new rights and duties are created by statute and new remedies are granted, the remedies prescribed are in their very nature exclusive.

Endlich on Interpretation of Statutes (1888) 216, Sec. 154, and cases cited.

This statute was never intended, nor can it be extended by interpretation to contracts between private individuals in suits brought in State Courts.

The trial Court in this case found and decided that a part of the contracts in the suit had for their purpose and object the sale and transfer of U. S. Letters Patent and rights growing out of such patents and that contracts A and B were license contracts under U. S. Letters Patent. That all said documents had for their purpose and object the settlement as between private parties of strenuous and expensive patent lawsuits, which were by the papers in dispute settled and discontinued.

A patent is not an article of inter-state commerce.

The license to use U. S. Letters Patent does not necessarily affect inter-state commerce.

Articles manufactured under U. S. Letters Patent and shipped from one state into another may constitute commerce between the states.

The purchase from various private parties of U. S. Letter Patents by the assignor of the defendant in error, even though such purchase extended to the ownership of the entire art in relation to spring tooth harrows and the granting of licenses to those who might wish to use those patents, does not constitute contracts having for their purpose the interference with inter-state commerce, which could not possibly arise until such time as those who were licensed to use the invention had produced the articles contemplated and shipped them from one state into another state as articles of inter-state commerce.

The defendant in error contends that the rule decided by this Court in the case of the United States vs. E. C. Knight Co. (156 U. S. 1), is controlling with reference to the facts disclosed in this case.

This was a suit in equity in the State Court between private parties.

The inter-state commerce act does not contemplate or permit a question with reference to inter-state commerce to be litigated or decided in a suit in equity in a state Court between private parties.

The state Court had no jurisdiction in such a suit to either consider or pass upon the question of whether the contracts were prohibited by the act of Congress.

That can only be done in the Circuit Court of the United States either in a suit in equity where the United States is plaintiff, or in a suit at law where the aggrieved party is plaintiff against the party who has committed the wrong. It was never contemplated that this act could be construed or interpreted by any State Court, or that the act could be made available to defeat a private contract between parties in a State Court.

In re Greene (52 Fed. Rep. 104) Judge Jackson, in substance decided that Congress had no authority under the commercial clause or any other provision of the constitution to limit the right of the corporations created by State law from acquiring, purchasing and holding and disposing of property in several states, even where the property might become inter-state commerce and the learned Judge further held that it was not the intention of the anti-trust laws, so called, to make illegal the acquisition of property

by State corporations, even though such acquisition might control the entire traffic of the country in that particular subject.

It has been repeatedly adjudged by the Circuit Court and Circuit Court of Appeals that the anti-trust law gave no color or authority to a State Court or even a Federal Court to determine the validity or effect of contracts which might or might not affect inter-state commerce, unless those questions were raised in a suit in equity wherein the United States was plaintiff or in the Circuit Court of the United States where the aggreived party was plaintiff; that these civil remedies were exclusive and must be applied in suits authorized by the act and in no other way.

Pidcock v. Harrington, 64 Fed. Rep. 821.
Southern Ind. Ex. Co. v. U. S. Exp. Co. 88 Fed. Rep. 659 (affirmed in '92 Fed. Rep. 1032.)
Gulf C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. Rep. 407.
Metcalf v. American S. F. Co., 108 Fed. Rep. 909.
Endlich on Intrepretation of Statutes (1888) 216, Sec. 154 and cases cited.

Had the plaintiff in error when sued in equity in the state court on its contracts, interposed as its sole ground of defense, that the contracts in dispute, had for their purpose and object the control and restraint of commerce between the states, and this fact had been found by the trial Court and it had been the only ground upon which the judgment of the N. Y. Court of Appeals rested, it would present to this Court no Federal question capable of review in this

Court for the obvious reason, that the suit was not one authorized by the act of Congress nor was it competent to plead the statute in a private suit thus brought and the consideration of the question by the State Court would have been as it is now utterly without jurisdiction to pass upon that question.

Had Congress intended to put it within the power of a defendant when sued in a State Court on a contract to interpose such a defense such legislation would have been unconstitutional because Congress is confined in its power to legislate to commerce between the states and with foreign nations.

It is idle to contend, we think, that the State Court in a private suit in equity had any power or right whatever, to pass upon the question whether or not the contracts were repugnant to the act. The State Court in fact never did pass on the effect of this statute on the contracts.

(*a.*) In the Trans-Missouri Joint-Traffic Association and the Addyston Pipe Company cases, this Court in substance held that the Sherman anti-trust laws applied to contracts and agreements relating exclusively to inter-state commerce and did not apply to contracts which might or might not incidentally, remotely or collaterally affect inter-state commerce. The act does not, therefore, apply to combinations of interest and property by those engaged in a kindred line of business through the formations of corporations or the employment of the same selling agents or by the sale or combination of sales to a single corporation; and contracts binding those who make the sales from not directly or indirectly engaging in the same business, that to all such agreements, they were

and are collateral to and refer remotely, if at all, to what may or may not afterwards become an article of inter-state commerce and as to such contracts the law does not apply.

The contracts in suit, did not and could not directly affect inter-state commerce, the most that can be said with reference to them is, that they place restraints upon these who took licenses under the patents and become manufacturers of the patented articles, which after their manufacture might or might not become the subject of inter-state commerce.

It was never the intention of Congress in the passage of the Sherman anti-trust law that it should apply to or control private business transactions where the direct effect of the contracts did not necessarily have for their object or purpose, the interfering with articles of inter-state commerce.

The interpretation contended for by the defendant in error, is sustained by this Court in the case of the State of Minnesota v. The Northern Security Company, a decision handed down February 24th, 1902.

POINT III.

The record in this case contains the evidence and proceedings had in the State Court.

In order to inject into this case an alleged Federal question, it is necessary that this Court should examine the evidence and find contrary to the trial Court that the anti-trust-law of the United States was violated in making and carrying into effect, the various agreements contained in the record.

The State Court found and decided as a matter of fact, that the various contracts did not involve any combination, trust or other monopolies, but were reasonable and just contracts, such as the parties had the right to make.

This finding cannot be overthrown.

In Egan v. Hart (165 U. S., 188-194) this Court says :

"The record before us contains all the testimony "introduced and evidence offered in the trial Court, "all of which was open for consideration and passed "upon by the Supreme Court of the State of Louisi- "ana. On error, however, to a State Court, this "Court cannot re-examine the evidence, and when "the facts are found below, this Court is concluded "by such findings. Dower v. Richards, 151 U. S., "658 ; Bartlett v. Lockwood, 160 U. S., 357 ; Stanley "v. Schwalby, 162 U. S., 255. True it is that in Dower "v. Richards the Court, referring to the dictum in Re- "publican River Bridge Co. v. Kansas P. R. Co. (92 "U. S., 315-317) treated as open for further consider- "ation the question whether in Chancery cases, power "resided in this Court to review the decision of the "State Court on both the law and fact.

"We however, conclude that not only the very na- "ture of the writ of error, but also the rulings of this "Court from beginning, make it clear that on error to a "State Court in a Chancery case as in a case had at "law, where the facts are found by the Court below, "this Court is concluded by such finding. The adjudi- "cations are collected very fully in Dower v. Richards "and in the subsequent cases above referred to."

In this case the Court further held that it was com-

petent for this Court to examine the opinion in the Court below for the purpose, not of deciding the facts, but by way of throwing light on the findings and looking into the entire record.

Crossley v. New Orleans, 108 U. S. 105.
Gross v. U. S. Mortgage, 108 U. S. 477.

POINT IV.

The decision of the New York Court of Appeals in this case, turns wholly on the interpretation of Section 1338 of the N. Y. Code of Civil Procedure and Section 9 of Article VI of the State Constitution.

The Court held that the findings of fact by the trial Court must be accepted in that Court as verities, and that all exceptions that raised questions of law, based on the findings of fact were out of the case and that the record showed no errors of law committed by the trial Court, which the Appellate Court had the right to consider, and therefore the judgment of the Appellate Court was reversed because no errors of law were found, and the judgment of the trial Court was affirmed.

The decision of the N. Y. Court of Appeals on the interpretations of the statutes and constitution of that State, are conclusive on this Court.

POINT V.

Freedom to make and enforce private contracts is guaranteed to every citizen of the United States;

this doctrine is a universal right ; indeed it is the very basis of civilization of a free people, and the word "Liberty" does not mean merely freedom from personal restraint, but by the interpretation of this court it has been extended to the protection for every lawful purpose in which a citizen may choose to embark.

The term "public policy" is frequently used in a very nebulus sense by the Courts and Judges. When resolved to its primary elements, there can be no such thing as public policy of a state or a nation, except as is prescribed by its legislation and by the decision of its courts.

People v. Hawkins, 157 N. Y., 1.

Has the United States any rule of public policy except as relates exclusively to an article of interstate or foreign commerce?

The owner of a patent does not hold his patent upon the condition that he shall make or vend the articles patented or allow others to do so for a reasonable compensation.

He may, if he chooses, remain absolutely quiet, and not only neglect and refuse to make the patented article, but he may likewise refuse to permit any one else to do so on any terms.

He may impose any terms within the domain of contract as a condition to the right to manufacture or use his invention. How far he may go is within his own power, which cannot be interfered with by the courts.

Having patented rights, the owner may plainly be permitted to make any agreement that does not affect

public morals which he chooses, with reference to their use.

It is idle, we contend for the plaintiff in error to assail the validity of the contracts, the purpose of which assault is to permit the plaintiff in error to keep the large consideration received and to repudiate the performance of the stipulations which it agreed to perform.

Good v. Daland, 121 N. Y., 1, 9.
Hobbie v. Jennison, 149 U. S., 353-363.
Morse Twist Drill & M. Co. v. Morse, 103 Mass., 76.
Central S. R. Co. v. Cushman, 143 Mass., 353.
Hules v. Bonsack M. Co., 65 Fed. Rep., 864.
Bonsack M. Co. v. Smith, 70 Fed. Rep., 383.

(*a.*) If there is any public policy with reference to the rights of an owner of one or more United States Letters Patents, it permits him to make such contracts with reference to their use as he may see fit, and it does not lie with the Courts to interfere with such contracts so long as they are based upon the patents and are the rights flowing therefrom.

The constitution does not attempt to give an individual or a series of individuals, a right to their respective inventions, nor does it grant an author the right to his composition ; it does, however, recognize an original pre-existing, inherent right of property in the invention and authorizes Congress to secure to authors and investors, the enjoyment of those rights, but the right existed before the constitution and above

the constitution, and is a natural right, more than that which any man can assert in almost any other kind of property.

The production of one's mind is confessedly as really property as the fabric of one's hands; indeed they are much more exclusive. The patent is a contract by which the inventor conveys to the commonwealth forever his invention in consideration of the exclusive right of the invention for a limited period.

The very nature of the rights under Letters Patent is that ownership.

LASTLY.

The writ of error should be dismissed or the judgment should be affirmed with cost.

February 25, 1902.

EDWIN H. RISLEY,

Of Counsel for Defendant in Error,

Utica, N. Y.

No. 215.

SUPREME COURT

Reply Br. of Risley

OF

THE UNITED STATES.

Office Supreme Court
FILED
APR 2 1902
JAMES H. McKENNEY,
Clerk

Filed April 2, 1902.

OCTOBER TERM 1901.
No. 215.

E. BEMENT & SONS,
Plaintiff in Error,

vs.

NATIONAL HARROW COMPANY,
Defendant in Error.

Replying Brief.

EDWIN H. RISLEY, *Of Counsel*
For the Defendant in Error.
Utica, N. Y.

The contention in the briefs of the plaintiff in error that the contracts in suit were part and parcel of an unlawful combination in restraint of trade, which effects inter-state commerce is not supported by the evidence or by the decision of the referee.

The contentions of counsel are contradictory and uncertain and are in substance:

First. That the contracts between the plaintiff in error and the New York corporation, executed and delivered at the same time and relating to the same transaction, should be read and interpreted together, and when so read and interpreted, they constitute an agreement in hostility to the provision of the Act of Congress, approved July 2nd, 1890.

Second. That the alleged contracts between the plaintiff in error and the New York corporation and between the latter and various other parties entered into at a much earlier date than the contract in dispute and those earlier dated contracts which had been previously cancelled, are to be resorted to as furnishing a motive and an intention in the making of the contracts in suit, which motive is to be resorted to as evidence affecting the validity of the contracts sued on.

In considering the first proposition, the defendant in error concedes that all of the papers executed and delivered at the same time relating to the same transaction and between the same parties, may be read and construed together.

The contracts are as follows:

First. Contracts A. and B.

Rec., pp. 7-19.

Second. Agreement to arbitrate as to the value of the patents and rights under patents assigned by the plaintiff in error to the New York Corporation.

Exhibit 6, *Rec.*, *pp.* 51, 52, 72.

Third. An agreement to pay a sum of money which should amount to one dollar each on all float spring tooth harrows sold and shipped by E. Bement & Sons, from Sept. 10th, 1890 to the date that the licenses were delivered, June 17, 1891.

See agreement Rec., *pp.* 72-73.

Fourth. Separate assignments of patents and patented rights under a license contract from Charles LaDow to the National Harrow Company, the said E. Bement & Company covenenting that they would save the National Harrow Company from all claims for royalties or damages on account of LaDow's rights and separate assignments of U. S. Letters Patent Nos. 441, 367, 450, 984. and 451, 422, dated June 17, 1891, the day on which all of the contracts were delivered.

Rec., *p.* 354.

Fifth. An assignment in realty by E. Bement & Sons to the New York Corporation of Re-issued Letters Patent of the U. S., No. 10,092, issued to Charles LaDow and an assignment of all interest under the same,

Rec., p. 352.

Sixth. Assigned on the same day a one-half interest in re-issued Letters Patent No, 10,041, and of patent No. 144,236, one-half interest in U. S. Letters Patent, re-issued No. 222,542, re-issued 10-082, contract with Charles LaDow, which gave to the plaintiff in error the right to make the Steel King Har-

row under assignments of patents No. 441,367, November 25th, 1890, No. 450,964, April 21, 1891, No. 451,422, April 28, 1891, and all other LaDow patents pertaining to the "Steel King" structure. E. Bement & Sons on the same day having idemnified the National Harrow Company of New York against all liability from the LaDow patent and released the company from defending it in any litigations with LaDow, growing out of the contracts with him or the patents owned by him so far as applied to the "Steel "King" Harrow.

This fact was found by the arbitrators in making their award as to the value of the rights transferred.

The Arbitrators Award found "8th, That E. "Bement & Sons were the owners of and have con- "veyed to the National Harrow Company the pat- "ents and interest in patents and rights thereunder "as set forth in Schedule H, hereto attached and "made a part of this report."

Rec., p. 314.
Schedule H, Rec., p. 319.

The arbitrators found in their answer that the value of the rights transferred by E. Bement & Sons to the National Harrow Company of N. Y., to be worth $29,200.

Rec., p. 315.

Seven. The Escrow agreement so called, appears to have been signed by the National Harrow Company of New York, E. Bement & Sons and Edward Norris, and is between different parties.

This Escrow agreement was signed on the same day on which all of the other papers in dispute were delivered.

The only purpose of the Escrow agreement was to determine the time of the delivery of the papers therein referred to.

The contracts which the referee decided were valid and binding, were only those contracts executed and delivered between the plaintiff in error and the National Harrow Company of N. Y., the assignor to the defendant in error. There is no finding in the record, that the Escrow agreement, so called, was a valid and binding agreement, or that it was ever delivered or become operative.

The referee found and decided that the contracts entered into between the plaintiff in error and the New York Corporation, on the 17th day of June, 1891, were the only contracts or agreements ever existing between the plaintiff in error and the New York Corporation, assignor to the defendant in error.

See references, sub-division 10, *p.* 7, *of defendant's in error brief and the references there cited.*

On these facts the referee properly decided that these various contracts constituted a sale by the plaintiff in error to the New York Corporation, of certain U. S. Letters Patent, license rights under patents and agreements pertaining thereto and constituted a valid sale thereof and a settlement of existing patent litigations.

On the 16th day of June, 1891, the day prior to the day on which the contracts in suit were executed and delivered, the trustees of the National Harrow Company, of New York, voted to deliver the contracts with other parties than the plaintiff in error, who at

that time had no contract relations with the New York Corporation.

Rec., pp. 351–352.
See Referee's report, pp. 63, 64.
Concessions Rec., p. 309.
Risley's evidence Rec., p. 155.
Brinkerhoff's evidence Rec., pp. 323, 324, 327.

The plaintiff in error on the undisputed evidence and the finding of the referee had no contract relations whatever with the New York corporation with any other persons, firms or corporations, relating to the sale of its patented rights and privileges and the settlement of pending patent litigation between the parties.

These agreements between the plaintiff in error and the New York corporation were not in any manner founded upon any previous contracts between the parties or between the plaintiff in error and any of the other parties with whom the New York corporation was in contract relation.

All of the contracts entered into between the plaintiff in error and the New York corporation are collateral to an independent of the alleged wicked combination between the New York corporation and several other persons, firms and corporations, who constituted the alleged illegal trust. The plaintiff in error was in no manner, directly or indirectly, connected with the alleged conspiracy between the New York corporation and other parties who are not parties to this suit.

The plaintiff in error sold and assigned by separate instruments in writing its U. S. Letters Patent and

licensed rights under patents to the New York corporation for the sum and price fixed by the arbitrators at $29,200, which was paid according to agreement of the parties and no part of this price has been tendered or offered to be restored.

The patents and patented rights sold by the plaintiff in error to the New York corporation are Nos. 10,041, 144,236, 222,542, 10,082, 441,367, 450,964 and 451,422.

By examining the list of patents in the license contracts in suit, it will be seen that neither of the patents assigned by the plaintiff in error are embraced in those contracts.

All of the U. S. Letters Patent embraced in the contracts in suit and their title were derived by the New York corporation from parties other than the plaintiff in error. The record shows that the Company had paid tens of thousands of dollars in money for many of these patents and had purchased from parties other than the plaintiff in error other patents by the issuing of its paid up capital stock for the price agreed upon with other parties.

The New York corporation owned the patents by purchase from parties other than the plaintiff in error, under which the latter company has been enjoined from the manufacture and sale of its spring tooth harrows.

It is true that the final decree had been opened by Judge Jackson on grounds not effecting the ground upon which the decree was pronounced, but on alleged newly discovered evidence of prior use.

It cannot be truthfully contended that any of the patents or patented rights specified in the license contracts, came through the plaintiff in error or that it ever had anything to do with them except to infringe them.

If it were to be assumed that the New York corporation was engaged in an unlawful effort to monopolize the spring tooth harrow trade of the United States by virtue of its U. S. Letters Patent and its agreements with other persons, firms and corporations than the plaintiff in error, it cannot avail itself of that fact when it was never a party thereto.

In Strait v. National Harrow Co., 51 Fed. Rep., 819, a suit in which the plaintiffs sought a permanent injunction restraining the defendant from instituting or prosecuting any action against the plaintiffs for the infringement of letters patent owned by the defendant covering certain improvements in spring tooth harrows, or from instituting or prosecuting any such suits against any person using the spring tooth harrows manufactured by the plaintiffs, the court said:

"In substance, the complaint shows that the de-
"fendant has entered into a combination with various
"other manufacturers of spring-tooth harrows for the
"purpose of acquiring a monopoly in this country in
"the manufacture and sale of the same, and, as an
"incident thereto, has acquired all the rights of the
"other manufacturers for the exclusive sale and man-
"ufacture of such harrows under patents, or interests
"in patents, owned by them respectively. Such a
"combination may be an odious and a wicked one,
"but the proposition that the plaintiffs, while infring-
"ing the rights vested in the defendant under letters
"patent of the United States, is entitled to stop the

"defendant from bringing or prosecuting any suit "therefor, because the defendant is an obnoxious cor- "poration, and is seeking to perpetuate the monopoly "which is conferred upon it by its title to the letters "patent, is a novel one, and entirely unwarranted. "The party having such a patent has a right to bring "suit on it, not only against a manufacturer who in- "fringes, but against dealers and users of the patented "article, if he believes the patent is being infringed ; "and the motive which prompts him to sue is not "open to judicial inquiry, because, having a legal "right to sue, it is immaterial whether his motives "are good or bad, and he is not required to give his "reasons for the attempt to assert his legal rights. "'The exercise of the legal right cannot be affected "'by the motive which controls it.'

Kiff v. Youmans, 86 *N. Y.*, 329."

The same doctrine is held in National Distilling Co., v. Cream City Importing Co., 86 Wis., 352–355.

Dennehy v. McNulta, 86 *Fed. Rep.*, 825–829.

Distilling & Cattle Feeding Co., v. People, 156 *Ill.*, 448.

The same doctrine was announced in The Charles E. Wisewall, 74 Fed. Rep., 802, where the Court assumed the existence of the alleged conspiracy to monopolize the barged service on the Hudson River, said :

"He (the claimant) should not be permitted to re- "pudiate his just debts to the individual tugs because "their association was illegal. Having asked for "their services and having accepted the benefit there- "of, he should pay. . . . An agreement by the "tug Mayflower to tow the dredge Wisewall, for a

"reasonable sum, from Albany to Troy, is not void "because the Mayflower is associated with other tugs "to regulate the price of towing at Albany. Should "the claimant purchase a pair of trousers at an "Albany clothing shop, he would find it difficult to "avoid paying their actual market price because the "vendor and other tailors of that city had combined "to keep up prices."

This Court in Connolly v. Union Sewer Pipe Co., No. 46 October Term, 1901, March 10th, 1902, say:

"Nor can the defendants refuse to pay for what "they bought upon the ground that the seventh sec- "tion of the Sherman Act gives the right to any person "'injured in his business or property by any other "'person or corporation by reason of anything forbid- "'den or declared to be unlawful' by the act, to sue "and recover treble the damages sustained by him. "We shall not now attempt to declare the full scope "and meaning of that section of the act of Congress. "It is sufficient to say that the action which it au- "thorizes must be a direct one and the damages "claimed cannot be set off in these actions based up- "on special contracts for the sale of pipe that have "no direct connection with the alleged arrangement "or combination between the plaintiff and other cor- "porations, firms or companies. Such damages can- "not be said, as matter of law, to have directly "grown out of that arrangement or combination, and "are, besides, unliquidated. Besides, it is well set- "tled in Illinois that 'unliquidated damages arising "'out of covenants, contracts or torts disconnected "'with plaintiff's claim cannot be set off under the "'statute.'" (p. 9).

The evidence shows that the plaintiff in error had no direct relation whatever with the New York corporation or with any of the persons, firms or corporations wrongfully connected therewith.

The plaintiff in error sold its patented rights and rights under patents to the New York corporation and received the prices agreed to be paid.

In the National Harrow Company v. Quick, 67 Fed. Rep., 130, the Circuit Court of the District of Indiana held that a party sued for an infringement of the plaintiff's patent could set up and defend his infringement on the allegations and proofs that the plaintiff had become the owner of the patent as the result of an unlawful combination.

On appeal from this judgment to the Circuit Court of Appeals for the Seventh Circuit, Judge Wood in speaking for the Court said :

"While not prepared, in view of the authorities, "to sanction the proposition that the infringer of a "patent may escape liability by showing that the legal "owner is engaged in a supposed unlawful combina- "tion or trust, we do not consider the point."

National Harrow Company v. Quick, 74 *Fed. Rep.*, 236.

The first case has never been cited so far as we know with approbation in any Court and cannot be considered as Law in any case except the one decided.

The second patent from the top of the second column of patents in each of the contracts is No. 201,-946. This patent had beened owned for some years by D. C. & H. C. Reed & Company, of Kalamazoo,

Michigan, in the territory of the United States lying west of Maryland, Pennsylvania and in the territory east of that line by G. B. Olin & Company, of Canandaigua, N. Y. This patent and others were purchased by the National Harrow Company from G. B. Olin & Co. in its territory upon the payment of $15,000 in money and the interest of D. C. & H. C. Reed & Co. for a still larger consideration paid in the capital stock of the New York corporation.

Reed & Company while owning this patent brought suit for infringement against one Smith, of Michigan, in the Circuit Court for the Eastern district of that State, and the case went to final hearing before Judge Brown, who followed prior decisions and sustained the patent.

Reed v. Smith, 40 *Fed. Rep.*, 882.

The plaintiff in error obtained from the New York corporation contracts the licenses in suit under this and other patents in or to which the plaintiff in error had no interest by contract or otherwise.

The decree in the last case cited was opened by Judge Jackson to enable the defendant to furnish new evidence of prior use.

Under this and numerous prior adjudications D. C. & H. C. Reed & Company had forced Charles H. Childs & Company, A. W. Stevens & Son, W. S. Lawrence and Taylor & Henry to settle and pay damages for infringement, and to pay royalties under the patent.

The suit of Reed v. Smith was brought against a dealer who was handling harrows manufactured by the plaintiff in error, and it was believed by all parties

in the harrow trade to be a valid patent as against all manufacturers of spring tooth harrows who used a clip for adjusting the harrow tooth on the frame in the direction of its length; these styles of harrow embraced the larger portion of harrows manufactured and sold in the United States.

The licensees and owners of this patent organized the National Harrow Company of New York, to whom their respective patents and rights under patents were assigned.

The record abundantly shows that the plaintiff in error had nothing to do with any of the patents mentioned in the license contracts in suit, nor did it have any contract relation with either of the parties or with the New York corporation, prior to the 17th day of June, 1891, when the contracts in dispute were executed and delivered.

This case therefore, in its last analysis is resolved to this:

The New York corporation claimed that its United States patents monopolized the spring tooth harrow trade conducted by the plaintiff in error and prosecutions were pending to enforce these alleged rights at the date of making the contracts in suit.

The plaintiff in error applied for and obtained the license contracts in suit to use the patents of the New York corporation, and it continued the manufacture and sale of its harrows under these licenses and made monthly verified reports and paid royalties thereunder for a considerable space of time; it then abandoned the contracts, and when sued by he defendant in error, alleged and attempted to

prove the unlawful character, not only of the New York corporation, but of the defendant in error. The plaintiff in error never had any relations on the evidence and findings to the alleged monopoly.

This contention is supported by the evidence and by the decision of the Trial Court.

The contention of the plaintiff in error that the contracts entered into by the New York corporation with sundry parties, other than the plaintiff in error, before the execution and delivery of the contracts in suit having been cancelled and annulled in accordance with the decision of the Supreme Court of the State of New York ; in the case of Strait v. National Harrow Company, referred to in the decision of the referee, cannot now be resorted to as a defense by a stranger to the transaction to escape liability on the contracts in suit.

The Sherman Anti-Trust Law has no application to the case, that law applies only to a direct attack wherein the United States is complainant or by a party who is injured by a suit at law in the same Court. It was never intended as a defense on a collateral contract.

Connolly v. Union Sewer Pipe Company, U. S. Supreme Court, No. 46, October Term, 1891 ; *March 10th,* 1902.

The State Court is without jurisdiction to decide the question.

The judgment appealed from should be affirmed or the appeal dismissed.

Dated March 25, 1902.

EDWIN H. RISLEY,

Of Counsel for Defendant in Error,

Utica, N. Y.

Supreme Court of the United States.

No. 215.—October Term, 1901.

E. Bement & Sons, Plaintiffs in Error, vs. The National Harrow Company. } In error to the Supreme Court of the State of New York.

[May 19, 1902.]

This is a writ of error to the Supreme Court of the State of New York, to which court the record had been remitted after a decision of the case by the Court of Appeals. The action was brought by the plaintiff below, the defendant in error here, a corporation, to recover the amount of liquidated damages arising out of an alleged violation by the defendant below, the plaintiff in error here, also a corporation, of certain contracts executed between the parties, in relation to the manufacture and sale of what are termed in the contracts "float spring tooth harrows," their frames and attachments applicable thereto, under letters patent owned by the plaintiff. The action was also brought to restrain the future violation of such contracts, and to compel their specific performance by the defendant. The case was tried before a referee pursuant to the statute of New York providing therefor, and he ordered judgment in favor of the plaintiff for over twenty thousand dollars, besides enjoining the defendant from violating its contract with the plaintiff, and directing their specific performance as continuing contracts. This judgment was reversed by the appellate division of the Supreme Court and an order made granting a new trial, but on appeal from such order the Court of Appeals reversed it and affirmed the original judgment. The defendant brings the case here by writ of error.

The particular character of the action appears from the pleadings. The complaint, after alleging the incorporation of both parties to the action, the plaintiff in New Jersey and the defendant in Michigan, averred that about April 1, 1891, the plaintiff's assignor, a New York corporation, entered with the defendant into certain license contracts, called therein Exhibits A and B. The substance of contract A is as follows: It stated that the plaintiff was the owner of certain letters patent of the United States, which had been issued to other parties and were then owned by the plaintiff, for improvements relating to float spring tooth harrows, harrow frames and attachments applicable thereto, eighty-five of which patents were enumerated, and that the defendant desired to acquire the right to use in its business of manufacturing at Lansing, (in the State of Michi-

gan,) and to sell throughout the United States, under such patents or some one or more of them, and under all other patented rights owned or thereafter acquired by the plaintiff, which applied to and embraced the peculiar construction employed by the defendant, during the term of such patents or either or any thereof, applicable to and embracing such construction. The plaintiff then, in and by such contract, gave and granted to the defendant the license and privilege of using the rights under those patents in its business of manufacturing, marketing and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto; a sample of the harrow frames and attachments the defendant was licensed to manufacture and sell, being (as stated) in the possession of the treasurer of the plaintiff, and marked and numbered as set forth in schedule A, which was made a part of the license. The license was granted upon the terms therein set forth, which were as follows:

(1) The defendant was to pay a royalty of one dollar for each float spring tooth harrow or frame sold by it pursuant to the license, to be paid to the plaintiff at its office in the city of Utica in the State of New York.

(2) The defendant was to make verified reports of its business each month and mail them to the plaintiff, and the defendant agreed that it would not ship these harrows to any person, firm or corporation to be sold on commission, or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered.

(3) The defendant agreed that it would not during the continuance of the license sell its products manufactured under the license at a less price or on more favorable terms of payment and delivery to the purchasers than was set forth in schedule B, which was made a part of the license, except as thereinafter provided.

(4) The plaintiff reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers, and it might reduce the royalty on the harrows manufactured under the license.

(5) The plaintiff agreed to furnish license labels to the defendant, which were to be affixed to each article sold, and the amount of ten cents paid for each of such labels was to be credited and allowed on the royalty paid by the defendant at the time of such payment.

(6) The defendant agreed that it would not, during the continuance of the license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows, &c., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other

licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff.

(7) The defendant agreed to pay to the plaintiff for each and every of the articles sold contrary to the strict terms and provisions of the license, the sum of five dollars, which sum was thereby agreed upon and fixed as liquidated damages.

(8) The defendant agreed not to directly or indirectly, in any way, contest the validity of any patent applicable to and embracing the construction which the defendant was licensed to manufacture, or which it might manufacture, for another licensee, which such other licensee was itself licensed to manufacture or sell, or the reissues thereof, and no act of either party should invalidate this admission. The defendant also agreed not to alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames, without teeth or attachments applicable thereto, which it was authorized to manufacture and sell under the license, in any part or portions thereof which embody any of the inventions covered by the letters patent, or any of them, or any reissues thereof.

(9) The plaintiff agreed that after the license was delivered it would not grant licenses or let to any other person the right to manufacture the articles named of the peculiar style and construction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff and referred to in schedule A of the license.

(10) Nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such samples as had been deposited by it with the plaintiff, and such as were embraced in the license.

(11) Any departure from the terms of the license might at the option of the plaintiff be treated as a breach of the license, and the licensee might be treated as an infringer, or the plaintiff might restrain the breach thereof in a suit brought for that purpose and obtain an injunction, the licensee waiving any right of trial by jury; such remedy was to be in addition to the liquidated damages already provided for.

(12) The termination of the license by the plaintiff was not to release the defendant from its obligation to pay for articles sold up to the termination of the license.

(13) The plaintiff agreed to defend the defendant in any suit brought for an alleged infringement.

(14) No royalties were to be paid for articles exported for use in a foreign country.

(15) The license was personal to the licensee and not assignable, except to the successors of the defendant in the same place and business, without

the written consent of the plaintiff, nor were the royalties or other sums specified to cease to be paid under any circumstances, except under the conditions named in the license during the continuance thereof.

(16) The parties agreed that the license should continue during the term of the patent or patents applicable to the license and during the term of any reissues thereof.

(17) The place of the performance of the agreement was the city of Utica, New York, and the agreement was to be construed and the rights of the parties thereunder determined according to the laws of New York.

(18) The consideration of the contract or license was one dollar, paid by each of the parties to the other, and the covenants contained therein to be performed by the other, and it applied to and bound the parties thereto, their successors, heirs and assigns.

Schedule A which followed contained a description of the particular kinds of harrow which the defendant was authorized to make and sell under the license. Schedule B contained a statement of the prices and terms of sale under the license, and it was therein stated that "A maximum discount of forty-two per cent may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England States, also States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia. A maximum discount of forty-five per cent may be allowed on all sales in the territory throughout the United States not mentioned above."

This contract or license was signed by the president of the National Harrow Company for the plaintiff, and A. O. Bement, president of the defendant corporation, for the defendant.

The other license, called Exhibit B, was in substance the same as Exhibit A, excepting that the privilege of sale for the articles manufactured was that portion of the territory embraced within the United States lying south, and west of Virginia, West Virginia and Pennsylvania, and there was some difference in the machines which the defendant was authorized to manufacture and sell under this license, and in regard to the prices to be charged for those machines not covered by the former contract or license.

These two agreements were, as stated, made parts of the plaintiff's complaint, and the plaintiff then set forth various alleged violations of the two agreements on the part of the defendant, and claimed a recovery of a large amount of damages under the provisions of the contracts, and prayed for an injunction restraining future violations and for a specific performance of the contracts.

The plaintiff also alleged that the plaintiff's assignor, the New York corporation, duly assigned to the plaintiff all its rights and interests in regard to the subject-matter of the two contracts, and that the plaintiff, at

the time of the commencement of the action, was the lawful owner of all such interests and rights, and was entitled to bring the action in its own name.

To this complaint the defendant made answer, denying many of its allegations and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows, to regulate their manufacture and to provide for their sale and the prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the Supreme Court of New York, and the contracts now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It also alleged that all of the various contracts were in violation of the act of Congress, approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress, (26 Stat. 209,) entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The case was referred to a referee to hear and decide, who, after hearing the testimony, reported in favor of the plaintiff. The material portions of his report are as follows:

"That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following-named parties: D. C. & H. C. Reed & Company, of Kalamazoo, Mich.; G. B. Olin & Company, Perry, and Canandaigua, N. Y.; Chase, Taylor & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J. M. Childs & Company, of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y., who began the harrow business in substantially the order named above.

"The first two above-named firms conducted their business in separate portions or territory of the United States, under the same United States letters patent, and the other firms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vigorously prosecuted and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor & Company, and W. S. Lawrence.

"Prior to September, 1890, the last four of the above-named firms settled their diputes over patents with the first two firms, and took licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two firms named, and the other parties than that of licensor and licensee under United States letters patent.

"In the year 1890, and just prior thereto, other persons, firms and corporations began the spring tooth harrow business and other patent lawsuits followed: Suits were begun against the defendants herein, and

against their customers purchasing their spring tooth harrows; and one case had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in another suit. Proceedings were pending upon an application for rehearing in these cases.

"In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

"In the conduct of the spring tooth harrow business, the harrows came to be known in the market as 'float spring tooth harrows;' that name having been adopted to differentiate the harrows from those known in the market as 'wheel harrows,' which had frame bars and curved spring teeth supported from an axle above, which axle had wheels at either end of the diameter above thirty inches. The two classes of harrows were differentiated, one being called a 'float' and the other a 'wheel' spring tooth harrow. The litigations had been wholly over the 'float' spring tooth harrows.

"The members composing the first six firms, above named, in the harrow business in September, 1890, organized under the laws of the State of New York the 'National Harrow Company.' That corporation was duly legally incorporated, and after its incorporation it received from the said six firms the transfer of their separate United States letters patent, license contracts and privileges under patents. The defendant's president, Arthur O. Bement, became and continued a director of this corporation until its dissolution, which followed in a little over a year.

"This corporation entered into some contracts with spring tooth harrow manufacturers, which were decided by the Supreme Court of the State of New York to be illegal as against public policy, on account of restraints contained in the contracts, which extended beyond the lifetime of the patents. That case is reported in the New York Supplement, vol. 18, page 224. (*Strait et al.* v. *National Harrow Company et al.*)

"Immediately following this decision, all of the contracts then in existence which were affected thereby were immediately cancelled by the parties to such contracts.

"The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company, looking to the selling of its patents and rights under patents relating to the spring tooth harrow business; but this contract was abandoned, the conditions upon which it was executed not having been complied with, the contract became and was wholly void.

"The defendant had no contract with the National Harrow Company until about June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred, and the defendant agreed to accept in payment there-

of the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of $29,000. The defendant was dissatisfied with the amount of the award, and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of $16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York company, the defendant accepted and agreed to take the stock of the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of $45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of $45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

"The transaction between the National Harrow Company of New York and this defendant had, in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the United States letters patent and licenses under United States letters patent relating to the float spring tooth harrow business conducted by the defendant, and it was founded on a good, valuable and adequate consideration moving between the parties.

"That, as a part of such transaction, the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts A and B, which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above, and the defendant and its customers, was settled. The papers which were executed in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B, the National Harrow Company of New York was the owner by assignment and purchase of a large number of United States letters patent, which it is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

"The sale by the defendant of its letters patent, and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B, were intended to and did, settle existing controversies with reference to the rights of the National Harrow Company of New York and the defendant.

"I decide that the contract entered into in June, 1891, including the contracts 'A' and 'B' between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts 'A' and 'B' imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept.

"In July, 1891, a corporation was organized under the laws of the State of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow busi-

ness. The New Jersey corporation was duly and legally organized in conformity with the laws of that State, and was by those laws and its charter authorized to purchase United States letters patent and to grant licenses under United States letters patent and to conduct the manufacturing business, and had a variety of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation, entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

"That the National Harrow Company of New Jersey, this plaintiff, through its duly constituted officers purchased from the National Harrow Company of New York all of its various United States letters patent, and all contracts, licenses and privileges which the National Harrow Company of New York then owned and possessed, and also purchnsed a part of its other property, rights and privileges.

"That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable and adequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation, and by the officers and directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent from the New York corporation to the New Jersey corporation.

"I decide that this transfer was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges and benefits accruing to the New York corporation under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

"The defendant's president, Arthur O. Bement, became a director and an active manager of the plaintiff, and continued as such down to September, 1893.

"The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of $13,900.

"The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B, and the plaintiff is now ready, willing and able to perform all of the stipulations and agreements to be performed on its part, as assignee of the National Harrow Company of New York.

"That the defendant, after having received and retained large pecuniary benefits under the contracts, has failed, neglected and refused, and still fails, neglects and refuses to keep and perform its contracts entered into, including the stipulations and provisions contained in contracts A and B, and since September, 1893, it has wholly repudiated contracts A and B, and refused to perform any of the stipulations contained therein which it

agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform."

The referee then states with some detail the various violations of the license agreements by the defendant, and finds the defendant indebted to the plaintiff in the sum of over twenty thousand dollars. He then continues as follows:

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction, and that all of the contracts in evidence were and are legal, valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted."

The referee then held the plaintiff entitled to a judgment against the defendant, declaring the validity of the plaintiff corporation and its title to the contracts and their validity, and decreeing specific performance thereof and restraining future violations of the contracts by the defendant. Judgment in accordance with the report was entered, from which the defendant appealed to the appellate division of the Supreme Court.

Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and it was therefore suspended and the case sent back to the referee for a resettlement, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel: "That the foregoing record, as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows." Those questions are eight in number, the fourth of which is: "Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890, chapter 647 of the first session of the Fifty-first Congress." This is the only Federal question raised and appearing in the record.

The case was thereupon argued before the appellate division, which reversed the judgment, and ordered a new trial, but it did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law. The plaintiff then appealed to the Court of Appeals from the order granting a new trial, and after argument it was held by that court that it had no jurisdiction to review the facts, and that upon the findings

of the referee there had been no error of law committed, and consequently the Supreme Court was wrong in reversing the judgment. The court therefore reversed the judgment of the Supreme Court, and affirmed the judgment entered upon the report of the referee.

Mr. Justice PECKHAM, after making the forgoing statement of facts, delivered the opinion of the Court.

In this court we are concluded by the findings of fact made in a State court in a suit in equity, as well as in an action at law. (*Dowers* v. *Richards*, 151 U. S. 658, 666; *Israel* v. *Arthur*, 152 Id. 355; *Egan* v. *Hart*, 165 Id. 188; *Hedrick* v. *Atchison, Topeka & Santa Fe Railroad Company*, 167 Id. 673, 677.)

The only Federal question raised in the record is as to the validity of contracts A and B, with regard to the act of Congress on the subject of trusts. (26 Stat. 209.) That is a question of law, plainly raised in the record, and we are not precluded from its consideration by any action of the State courts. If, however, facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. The contention of the defendant is that the two contracts A and B are in truth a part and continuation of the agreements set forth in the defendant's answer, and that taken together they prove a purpose and oombination on the part of all the dealers in patented harrows to control their manufacture, sale and price in all portions of the United States, and defendant avers that such a contract or combination was and is void, not only as against public policy, but also because it is a violation of the Federal statute upon the subject of trusts and illegal combinations. Those former alleged contracts are not mentioned in the report of the referee excepting, as he stated, they had been declared void as against public policy, and as being in restraint of trade because they extended beyond the life of the patents therein mentioned, and the referee found that following this decision all of the contracts then in existence, which were affected thereby, were immediately cancelled by the parties thereto.

The referee made no finding of any fact connecting the contracts A and B with prior contracts of a like nature including other parties, as alleged in the answer of the defendant. The referee did find, however, that the defendant had no contract with the National Harrow Company until June 16 or 17, 1891, at which time several contracts were entered into between the plaintiff and the National Harrow Company of New York, and among other contracts the plaintiff executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which relate to the defendant's float spring tooth harrow business. He also found that

such contracts constituted an absolute sale of the property and privileges thereby transferred, and that the defendant agreed to and did accept in payment thereof paid up capital stock of the plaintiff. He further found that the transaction between the assignor of the plaintiff and the defendant in June, 1891, was intended by the parties to be an absolute sale by the defendant to such assignor of the United States letters patent and licenses under such patents relating to the float spring tooth harrow business conducted by the defendant, and that it was founded upon a good, valuable and adequate consideration between the parties; that as a part of such consideration the assignor of the plaintiff granted and delivered to the defendant the license contracts A and B, heretofore spoken of, and that upon the consummation of the transaction the controversy over patents and infringements existing between the first six firms named in the referee's report and the defendant and its customers was settled. The report also decided "that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone and construed accordingly.

The referee also decided that the plaintiff was a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction, and that all the contracts in evidence were and are legal, valid and binding contracts, and such as might reasonably be made under the circumstances, and were founded upon a good, valuable and adequate consideration, and were reasonable in their provisions, and that they embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust or illegal combination, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts A and B, are, and were, intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

When he speaks of all the contracts in evidence, the referee plainly means all the contracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in

fact, other contracts than those designated A and B between these parties, and such other contracts had been put in evidence, and previously referred to by the referee. He, therefore, must have included what is termed the escrow agreement in his finding, that all the agreements made by defendant with the plaintiffs were valid. That agreement is set forth in the margin.*

There is no finding by the referee that this agreement was ever signed by any one other than the parties to this action, or that any other person received the licenses from and made contracts with the plaintiff similar to the ones entered into between these parties. All that the referee finds is, that all the contracts in evidence were legal, by which was meant, as already stated, all the contracts in evidence between the parties to the action, which were in existence and uncancelled. In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, and we are brought back to the question whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with, or forming a part thereof, are void as a violation of the act of Congress.

The plaintiff contends in the first place that only the Attorney General of the United States can bring an action under the statute, excepting that

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*" *Escrow Agreement.*

"This memoranda of agreement, made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a corporation of Utica, in the State of New York, and Edward Norris of the same place; and E. Bement & Sons of Lansing, in the State of Michigan.

"Whereas, the said National Harrow Company is the owner of a large number of letters patent relating to float spring tooth harrows, and is desirous of granting licenses thereunder to the following-named persons, firms and corporations, to wit: Chas. H. Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndeen Manufacturing Company, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everest & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

"And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms and corporations, to be signed and executed by said respective persons, firms and corporations—

"Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris,

by section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any Circuit Court of the United States, in the district in which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action.

The first section of the act provides that "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in viola-

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whereupon they shall become operative, and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same, in person or by mail.

"But in case any of the above-named persons, firms and corporations shall neglect or refuse to sign, execute and deliver said respective contracts and licenses on or before the 1st day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

"Witness the signatures of the parties.

"THE NATIONAL HARROW CO.,
By CHAS. H. CHILDS, *Pres't.*
EDWARD NORRIS.
E. BEMENT & SONS,
By A. O. BEMENT, *Pres't.*

"Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

"Dated this 1st day of April, 1891. EDWARD NORRIS."

tion of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal.

This brings us to a consideration of the terms of the license contracts for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question is that the agreements concern articles protected by letters patent of the government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it. As stated by Mr. Justice Nelson, in *Wilson* v. *Rousseau*, (4 How. 646, 674,) in speaking of a patent:

"The law has thus impressed upon it all the qualities and characteristics of property for the specified period; and has enabled him to hold and deal with it the same as in the case of any other description of property belonging to him, and on his death it passes, with his personal estate, to his legal representatives, and becomes part of the assets."

Again, as stated by Mr. Chief Justice Marshall, in *Grant* v. *Raymond*. (6 Pet. 218, 241:)

"To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our government. It was taken up by the first Congress at its second session, and an act was passed authorizing a patent to be issued to the inventor of any useful art, &c., on his petition, 'granting to such petitioner, his heirs, administrators or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery.' The law farther declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right to their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually re-

ceived: if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

In *Heaton-Peninsular Company* v. *Eureka Specialty Company,* (47 U. S. App. 146, 160,) it is stated regarding a patentee:

"If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe* v. *Knap,* (17 Fed. Rep. 204,) is not supported by reason or authority."

It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation. Thus an improvement for burning oil, protected by letters patent of the United States, was condemned by the State inspector of Kentucky as unsafe for illuminating purposes under the statute requiring an inspection and imposing a penalty for the violation of the statute, and it was held that the enforcement of the statute was within the proper police powers of the State, and that it interfered with no right conferred by the letters patent. (*Patterson* v. *Kentucky,* 97 U. S. 501.)

There are decisions also in regard to telephone companies operating under licenses from patentees giving them the right to use their patents for the purpose of operating public telephone lines, but prohibiting companies from serving within such district any telephone company, and it has been held in the lower Federal courts that such a prohibition was of no force; that it was inconsistent with the grant, because a telephone company, being in the nature of a common carrier, was bound to render an equal service to all who applied and tendered the compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any public telephone company, yet, having done so, they were not at liberty to place restraints upon such

a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company and could not exercise the franchise of a common carrier of messages with such exception to the grant. (See *Missouri ex rel. &c.* v. *Bell Telephone Company*, 23 Fed. Rep. 539; *State ex rel. &c.* v. *Delaware &c. Company*, 47 Id. 633; and *Delaware & Atlantic &c. Company* v. *State of Delaware ex rel. &c.*, 3 U. S. App. 30.)

These cases are cited in the opinion of the court in the case of *Heaton-Peninsular Company* v. *Eureka Specialty Company*, (*supra.*) Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

The contention that they do not affect interstate commerce, is not correct. We think the licenses do by their terms and by their plain meaning refer to, include and provide for interstate as well as other commerce. The contract called Exhibit B provides for the manufacture at Lansing, Michigan, and for the sale of the articles there made in territory lying south and west of Virginia and West Virginia and Pennsylvania, and the referee finds that a number of harrows have been sold under that contract. The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the State of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 Id. 505; *Addystone Pipe &c. Company* v. *United States*, 175 Id. 211.) But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers.

United States v. *E. C. Knight Company*, (156 U. S. 1,) does not bear upon the facts herein. That case related to a purchase of stock in

manufacturing companies, by reason of which the purchaser secured control of a large majority of the manufactories of refined sugar in the United States. It was held by this court that the Federal act relating to trusts and combinations affecting interstate commerce could not reach and suppress the creation of a monopoly in regard to the refining of sugar, and that the manufacturing of a commodity bore no direct relation to commerce between the States or with foreign nations. It was said by Mr. Chief Justice Fuller, for the court, while speaking of such manufacture: "Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In these contracts provision is expressly made, not alone for manufacture, but for the sale of the manufactured product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. (*Addystone Pipe & Steel Company* v. *United States*, 175 U. S. 211, 238.) These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent, them in the future. The execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

It is also objected that the agreement of the defendant not to manufacture or sell any other float spring tooth harrow, &c., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the

license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress.

The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.

There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others therein contained, which would render the contracts between these parties void as in violation of the act of Congress.

It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found. Upon the facts found there is no error in the judgment of the Court of Appeals, and it must, therefore, be

Affirmed.

Mr. Justice HARLAN, Mr. Justice GRAY and Mr. Justice WHITE did not hear the argument and took no part in the decision of this case.